

DOCKET

No. 88-493-CFX
Status: GRANTED

Title: University of Pennsylvania, Petitioner
v.
Equal Employment Opportunity Commission

Docketed:
September 19, 1988

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Fairson, Steven B., Lee, Rex E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 19 1988	G	Petition for writ of certiorari filed.
3	Oct 18 1988		Order extending time to file response to petition until November 20, 1988.
4	Nov 17 1988		Brief amicus curiae of American Assn. of University Professors filed.
6	Nov 21 1988	X	Brief of respondent EEOC in opposition filed.
7	Nov 21 1988	X	Brief amici curiae of Princeton University, et al. filed.
5	Nov 22 1988		DISTRIBUTED. December 9, 1988
8	Dec 1 1988	X	Reply brief of petitioner University of Pennsylvania filed.
9	Dec 12 1988		Petition GRANTED. limited to Question 2 presented by the petition. Justice Brennan OUT. *****
10	Jan 9 1989	*	Record filed. Certified copy of briefs, appendix, supplemental joint appendix and partial proceedings received.
11	Jan 26 1989		Joint appendix filed.
12	Jan 26 1989		Brief of petitioner University of Pennsylvania filed.
13	Jan 30 1989	*	Record filed. Certified copy of original record received.
14	Feb 27 1989		Brief of respondent EEOC filed.
15	Mar 8 1989		SET FOR ARGUMENT, APRIL 18, 1989. (3rd CASE)
16	Mar 15 1989		CIRCULATED.
18	Mar 29 1989		Reply brief of petitioner University of Pennsylvania filed.
17	Mar 30 1989		LODGING by petitioner.
19	Apr 7 1989		The order entered December 12, 1988, granting the petition for a writ of certiorari is amended to read: The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. This case is removed from the calendar for argument on April 18, 1989. The case will be argued during the October Term 1989.
21	May 8 1989		Order extending time to file brief of petitioner on the merits until June 20, 1989.
22	Jun 16 1989		Brief amicus curiae of American Assn. of University Professors filed.
23	Jun 20 1989	G	Motion of President and Fellows of Harvard College for leave to file a brief as amicus curiae filed.
25	Jun 20 1989		Order further extending time to file brief of petitioner on the merits until June 23, 1989.
24	Jun 23 1989		Brief of petitioner University of Pennsylvania filed.
26	Jun 23 1989		Lodgings, 9, and exhibit binder and 1 appointment handbook received.

Entry	Date	Note	Proceedings and Orders
27	Jun 23 1989	Brief amicus curiae of American Council on Education filed.	
28	Jun 23 1989	Brief amici curiae of Stanford University, et al. filed.	
29	Jun 30 1989	LODGING received. Referred in AC Brief of Stanford, Yale and Princeton.	
30	Jul 10 1989	Lodging received. (3 hand books).	
32	Jul 12 1989	Order extending time to file brief of respondent on the merits until August 10, 1989.	
33	Aug 10 1989	Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed.	
34	Aug 10 1989	Order further extending time to file brief of respondent on the merits until August 15, 1989.	
35	Aug 15 1989	Brief of respondent United States in opposition filed.	
36	Aug 25 1989	CIRCULATED.	
37	Aug 28 1989	SET FOR ARGUMENT TUESDAY, NOVEMBER 7, 1989. (1ST CASE)	
38	Sep 13 1989	Lodging received.	
39	Sep 13 1989	X Reply brief of petitioner filed.	
40	Nov 6 1989	Motion of President and Fellows of Harvard College for leave to file a brief as amicus curiae GRANTED.	
41	Nov 7 1989	ARGUED.	

**PETITION
FOR WRIT OF
CERTIORARI**

88-433
No. 88-

Supreme Court, U.S.
FILED

SEP 19 1988

BOSTON, MASSACHUSETTS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

Of Counsel:

Shelley Z. Green
Neil J. Hamburg
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

Steven B. Feirson
(Counsel of Record)
Alan D. Berkowitz
Nancy J. Bregstein
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000

Counsel for Petitioner

September 19, 1988

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Commission, in an investigation conducted under Title VII of the Civil Rights Act of 1964, may compel the disclosure of confidential academic peer review tenure materials which are protected by the First Amendment without affording *any* consideration to the First Amendment interests at stake.

2. Whether the "first-filed" rule of federal comity, which counsels the stay or dismissal of an action that is duplicative of a previously-filed action in another federal court, is violated when a court retains jurisdiction over the second-filed action on the ground that it disapproves of the first plaintiff's choice of forum, even though that choice has been upheld by the first court.

PARTIES BELOW

The only parties to this proceeding in the court below were those indicated in the caption of this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. The EEOC's Investigation	3
B. The Declaratory Judgment and Enforcement Proceedings	5
1. The declaratory judgment action	5
2. The enforcement action	6
C. The Decisions Below	7
1. The District Court	7
2. The Court of Appeals	7
REASONS FOR GRANTING THE WRIT	10
I. The <i>Franklin & Marshall</i> Rule, Reaffirmed by the Third Circuit in this Case, Conflicts with Decisions of Other Courts of Appeals and with Decisions of this Court.	10
A. An Intractable Conflict in the Circuits Concerning the Discoverability of Confidential Peer Review Materials Should Be Resolved by This Court As Soon As Possible.	10
B. The Third Circuit's Decisions Conflict with This Court's First Amendment Decisions. . .	15

TABLE OF CONTENTS—(Continued)

	Page
II. The Third Circuit's Decision on the University's Motion to Dismiss Conflicts in Principle with a Decision of this Court and Calls for the Exercise of this Court's Supervisory Power.	17
A. The Decision Below Conflicts in Principle with this Court's Decision in <i>Piper Aircraft Co. v. Reyno</i>	17
B. The Third Circuit's Decision Calls for the Exercise of this Court's Supervisory Power .	18
CONCLUSION.	22
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases:	Page
<i>Bergman v. Bowling Green State University</i> , 820 F.2d 1224 (6th Cir. 1987).	12
<i>Cockrell v. Middlebury College</i> , 148 Vt. 557, 536 A.2d 547 (1987).	13
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800 (1976).	19
<i>Crosley Corp. v. Hazeltine Corp.</i> , 122 F.2d 925 (3d Cir. 1941), <i>cert. denied</i> , 315 U.S. 813 (1942) .	8
<i>In re Dinnan</i> , 661 F.2d 426 (5th Cir. 1981), <i>cert. denied</i> , 457 U.S. 1106 (1982)	11
<i>Dixon v. Rutgers University</i> , 110 N.J. 432, 541 A.2d 1046 (1988)	13
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), <i>cert. denied</i> , 476 U.S. 1163 (1986)	8, 9, 10, 11, 14, 15, 16, 17
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983).	12
<i>Gibson v. Florida Legislative & Investigative Comm.</i> , 372 U.S. 539 (1963)	16
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	10, 11, 12
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947)	19
<i>Jackson v. Harvard University</i> , 111 F.R.D. 472 (D. Mass. 1986)	13
<i>Kerotest Mfg. Co. v. C-O-Two Co.</i> , 342 U.S. 180 (1952)	19
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir. 1977), <i>cert. denied</i> , 434 U.S. 904 (1977) .	12
<i>Lever v. Northwestern University</i> , No. 84 C 11025 (N.D. Ill. May 21, 1987)	13

TABLE OF AUTHORITIES—(Continued)

Cases:	Page
<i>Lowe v. SEC</i> , 472 U.S. 181 (1985).....	16
<i>Lyng v. Payne</i> , 476 U.S. 926 (1986).....	10
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337 (9th Cir. 1981).....	12
<i>McKillop v. University of California</i> , 386 F.Supp. 1270 (N.D. Cal. 1975).....	13
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979) ...	16
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	17
<i>Orbovich v. Macalester College</i> , 119 F.R.D. 411 (D. Minn. 1988).....	13
<i>Facesetter Systems, Inc. v. Medtronic, Inc.</i> , 678 F.2d 93 (9th Cir. 1982).....	20
<i>Paul v. Leland Stanford University</i> , 39 EPD ¶35, 918 (N.D. Cal. 1986).....	13
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981).....	17, 18
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978).....	15
<i>Rollins v. Farris</i> , 108 F.R.D. 714 (E.D. Ark. 1985).....	13
<i>Rubin v. Regents of the University of California</i> , 114 F.R.D. 1 (N.D. Cal. 1986).....	11, 13
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957).....	15, 16
<i>United States v. Rodgers</i> , 466 U.S. 475 (1984)....	10
<i>Washington Metropolitan Area Transit Authority v. Rangone</i> , 617 F.2d 828 (D.C. Cir. 1980).....	20

TABLE OF AUTHORITIES—(Continued)

	Page
<i>West Gulf Maritime Ass'n v. ILA</i> , 751 F.2d 721 (5th Cir. 1985), cert. denied, 474 U.S. 844 (1985).....	19, 20
<i>Zaustinsky v. University of California</i> , 96 F.R.D. 622 (N.D. Cal. 1983)	11, 13
Rules & Statutes:	
28 U.S.C. § 1254(1).....	2
42 U.S.C. § 2000e-8(a).....	2
5 U.S.C. § 553.....	5
28 U.S.C. § 1404(a)	6, 21
Other Authorities:	
Recent Development, <i>A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?</i> , 40 Vand. L. Rev. 1397 (1987).....	11, 14
Note, <i>Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions</i> , 28 B.C.L. Rev. 559 (1987) .	11
Commentary, <i>The Qualified Academic Freedom Privilege: A Closer Look at EEOC v. University of Notre Dame</i> , 41 Ed. L. Rep. 1209 (1987)....	11
Peer Review in Personnel Decisions: <i>Disclosure and Confidentiality</i> , 9 Lex Collegii 1 (1986)	11
Note, <i>Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases</i> , 21 Suffolk U.L. Rev. 691 (1987).....	14

TABLE OF AUTHORITIES—(Continued)

Other Authorities:	Page
Brown, <i>The Confidential Peer Review Process at Institutions of Higher Education: A Case for the Use of a Balancing Test</i> , 41 Ed. L. Rep. 421 (1987)	14
DeLano, <i>Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?</i> , 14 J. Coll. & Univ. L. 121 (1987)	15
Fishbein, <i>New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities</i> , 12 J. Coll. & Univ. L. 381 (1985) ...	15
Kluger, <i>Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response</i> , 15 J.L. & Educ. 319 (1988)	15
Note, <i>Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege</i> , 69 Cal. L. Rev. 1538 (1981) ...	15
Note, <i>The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation</i> , 65 Wash. U.L.Q. 445 (1987).....	15

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

Petitioner, the University of Pennsylvania, respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1 to A-27) is reported at 850 F.2d 969 (3d Cir. 1988). A petition for rehearing was denied in an unreported order (A-28). The orders of the District Court (A-34 to A-35) are

unreported. The Equal Employment Opportunity Commission's determination not to modify its subpoena (A-29 to A-33) also is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1988. A timely petition for rehearing was denied on August 11, 1988 (A-28). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . .

42 U.S.C. § 2000e-8(a) provides in pertinent part:

In connection with any investigation of a charge filed under Section 2000e-5 of this title, the [Equal Employment Opportunity] Commission . . . shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

STATEMENT

This petition grows out of one of two pending cases concerning a subpoena issued by the Equal Employment Opportunity Commission ("Commission" or "EEOC") to the Trustees of the University of Pennsylvania ("the University"), in the course of an investigation of discrimination charges under Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* The subpoena sought, among other things, "peer review" materials, that is, confidential written evaluations of a candidate for tenure by the candidate's academic peers. The Court of Appeals' affirmance of an order of the District Court for the Eastern District of Pennsylvania, which granted enforcement of the Commission's subpoena and directed the University to produce these confidential and sensitive materials, is the subject of this petition.

A. The EEOC's Investigation

Rosalie Tung, a junior faculty member in the Management Department of the University's Wharton School, was considered for tenure during the 1984-85 academic year. Wharton's Advisory Committee on Faculty Personnel ("Personnel Committee") recommended against tenure, overriding a close vote in favor of tenure by the faculty members of Tung's department. The Personnel Committee based its decision on several factors, including a lack of scholarly depth in Tung's writings. The University offered Tung a *de novo* review by a new and different Personnel Committee, but Tung declined this offer.

Tung filed a charge with the EEOC, alleging discrimination based on sex and national origin (Chinese). The University cooperated willingly with the Commission's investigation of Tung's charge and provided extensive materials to the Commission.¹ The University

1. In response to the Commission's numerous requests for information and documents, the University provided, among other things, two detailed position statements describing its tenure review process and its consideration of Tung in particular; the Personnel Committee's statement of reasons for the denial of tenure to Tung; Tung's complete personnel file; most of Tung's tenure review file, including her curriculum vitae, list of publications, statement of past accomplishments and future goals, teaching evaluations by students, and a description of her published articles; a chart of

objected to the production of only one type of information: confidential peer review materials.² The University refused to produce Tung's peer review materials, as well as similar materials sought by the Commission from the files of five other unrelated faculty members. The University stated that disclosure of these confidential peer review materials would undermine the integrity of the peer review tenure process — by which the University decides, for the foreseeable future, who will teach, what will be taught, and what research will be done — and consequently would infringe the University's First Amendment right to academic freedom.

In September, 1986, the Commission issued a subpoena *duces tecum* demanding the production of the requested peer review materials. On October 10, the University petitioned the Commission to modify its

NOTES (Continued)

candidates considered by Wharton by sex, race, national origin, rank, and department, and the action taken on each candidacy; a chart showing appointments to the rank of full professor at Wharton by department, sex, race, and national origin; portions of the University's faculty handbook discussing the faculty structure, tenure review process, and grievance procedure; a summary of applications for Management Department positions by race, sex, and national origin; the University's EEO-6 Form; a description of the University's policies on faculty salary merit increases; charts showing salaries and salary increases for associate professors at Wharton, by national origin; a chart showing the number of evaluation letters solicited on behalf of candidates for tenure in the Management Department; and information on vacancies, advertisements, and recruitment for positions at Wharton.

2. Because tenure usually is a lifetime commitment to a teacher by a college or university, tenure decisions are critical to the quality of education that a school can offer its students and the kind of scholarship that will be provided for the benefit of the public at large for many years to come. An essential part of this tenure review process consists of written evaluations of a tenure candidate's scholarship by specialists in the candidate's field, both at the university in question and at other institutions. These sensitive and confidential written evaluations of a tenure candidate constitute "peer review" materials.

subpoena by balancing the Commission's need for access to investigative materials against the "important societal and constitutional interests in preserving the integrity of the peer review process." A-5. The national headquarters of the EEOC denied the University's petition on April 10, 1987, relying on its consistent nationwide policy, and demanded the production of the peer review materials within twenty days. A-29 to A-33.

B. The Declaratory Judgment and Enforcement Proceedings

1. *The declaratory judgment action.* To challenge the EEOC's consistent national policy of demanding access to confidential peer review materials, and to obtain a ruling not only for this case but also for the future, the University brought suit on May 1, 1987, in the District Court for the District of Columbia.³ The University sought a declaratory judgment as to the unconstitutionality of the Commission's policy, as well as its unlawfulness under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The University also sought injunctive relief against the enforcement of the subpoena in the Tung investigation.

The Commission moved to dismiss the entire action on grounds of lack of subject matter jurisdiction, improper venue, and failure to state a claim. After full briefing and argument, Judge Jackson denied the Commission's motion on September 3, 1987. The declaratory judgment action then went forward: discovery was conducted and cross-motions for summary judgment

3. The University's concern went beyond this case, in which it is the subject of an EEOC investigation. The University also was concerned about the predicament faced by its faculty members who are asked to provide evaluations of tenure candidates at the University as well as at other schools around the country.

were filed. Those motions are now awaiting oral argument and decision.⁴

2. *The enforcement action.* On June 19, 1987 — six weeks after the University filed its action in the District of Columbia and while the Commission's motion to dismiss that action was pending — the Commission filed a new action in the District Court for the Eastern District of Pennsylvania for enforcement of its subpoena, the same subject matter as one of the Counts in the prior filed District of Columbia Complaint. The Commission took the position that the only consideration on such an application was whether the information subpoenaed was relevant to the investigation, and that the University could not raise its constitutional or APA defenses in the subpoena enforcement action. The University moved to dismiss the Commission's suit on grounds of federal comity, in favor of the previously-filed and more comprehensive action in the District of Columbia. The University stated its intention, in the event the action was not dismissed, to raise its constitutional and APA defenses. In support of those defenses, the University intended to submit affidavits from college and university presidents, deans, and professors attesting to the vital importance of confidentiality in the peer review process;⁵ and the University also sought discovery about

4. On September 30, 1987 — after the District Court's decision in the enforcement action — the Commission moved for a stay of the District of Columbia action pending the Third Circuit's decision on appeal of the enforcement order. Judge Jackson denied that motion on October 5, 1987. The Commission did not move at any time during the pendency of the enforcement action to have the D.C. action transferred to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The Commission belatedly filed such a transfer motion on July 15, 1988. The Court has not yet disposed of that motion.

5. In its District of Columbia action, the University submitted the affidavits of John Brademas, President of New York University; John P. Fackler, Dean of Texas A & M University; Ronald E. Frank, Dean of the School of Management, Purdue University; James O.

the EEOC's policy and practices concerning peer review materials.

C. The Decisions Below

1. *The District Court.* The District Court (Hannum, J.) ordered the University to produce the subpoenaed documents and then denied the University's motion to dismiss as "moot." Preliminarily, the court denied the University any discovery, on the ground that the University's constitutional and APA defenses "are an improper response to an application to enforce an administrative subpoena." A-34.⁶ In a separate order, the District Court proceeded directly to the merits of the enforcement issue and, without stating any reasons, granted the Commission's application for enforcement of its subpoena. Only then did the court address the preliminary issue of comity, denying the University's motion to dismiss as "moot." A-35.⁷

2. *The Court of Appeals.* The Court of Appeals affirmed the District Court's refusal to dismiss the

Freedman, President of Dartmouth College; Sheldon Hackney, President of the University of Pennsylvania; Aaron Lemonick, Dean of the Faculty of Princeton University; Paul J. Mishkin, Professor of Law, University of California at Berkeley; Harry C. Payne, Provost and Acting President of Haverford College; Clinton A. Phillips, Dean of Faculties and Associate Provost of Texas A & M University; William P. Pierskalla, Deputy Dean for Academic Affairs at the Wharton School, University of Pennsylvania; James N. Rosse, Vice President and Provost of Stanford University; Robert B. Stevens, Chancellor of the University of California at Santa Cruz; and Mayer N. Zald, Professor of Sociology and Social Work at the University of Michigan. Those affidavits unanimously attest to the critical importance of confidentiality to the peer review process and to the destructive impact that has and will occur to that process from a requirement of routine disclosure of peer review materials.

6. Consequently, the University never had the opportunity to submit the affidavits described in note 5, *supra*.

7. The District Court refused to stay its order, but a stay was entered by the Court of Appeals on October 16, 1987.

enforcement action in favor of the previously-filed declaratory judgment action. The Court acknowledged the vitality of the "first-filed rule," which dictates that "[i]n all cases of federal concurrent jurisdiction, the court which first has possession of the subject must decide it." *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). A-2. It also acknowledged that "this policy of comity has served to counsel trial judges to exercise their discretion by enjoining the subsequent prosecution of 'similar cases . . . in different federal district courts.'" A-2 (citation omitted). Finally, the court recognized that the procedural posture of this case "could lead to the anomalous result of the District of Columbia judge declaring the EEOC subpoena policy unconstitutional or unenforceable, but this court nevertheless ordering it to comply with the Eastern District of Pennsylvania judge's order enforcing the subpoena," and that, indeed, "this is the type of situation that prompted the first-filed rule." A-8 to A-9.

Nevertheless, the court held that the District Court's retention of jurisdiction in the second-filed action was a permissible exercise of discretion, in view of the existence of precedent in the Third Circuit favorable to the Commission's position on enforcement of the subpoena. See *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).⁸ It was the Court of Appeals' view that the University "instituted suit in one forum in anticipation of the opposing party's imminent suit in another, less favorable, forum." A-15. Accordingly, the Court of Appeals concluded that the first-filed rule "should not apply when at least one of the filing party's motives is to

8. The *Franklin & Marshall* opinion is reproduced in the appendix to this petition, at A-36 to A-61.

circumvent local law and preempt an imminent subpoena enforcement action." A-18.⁹

With respect to the University's First Amendment defense to enforcement of the subpoena, the Court of Appeals "affirm[ed] the district court's order [granting enforcement], but on different grounds." A-21. The court agreed with the University as to its right to raise a constitutional defense but summarily rejected it on the authority of the prior panel decision in *Franklin & Marshall, supra*. In *Franklin & Marshall*, a divided panel of the Third Circuit refused to apply either a qualified privilege or a balancing approach in connection with EEOC subpoenas of peer review materials. The panel majority reached this conclusion in spite of its recognition that confidentiality plays an important role in the tenure review process and that the tenure process is a critical component of a university's activities which are protected by the First Amendment. 775 F.2d at 114 (A-44 to A-45). Nevertheless, the *Franklin & Marshall* court gave no weight to the First Amendment interests at stake, ruling instead that Congress' amendment of Title VII in 1972 to cover academic institutions meant that Congress intended universities to be treated no differently than any other employers. *Id.* at 114-15 (A-45 to A-47). Thus, the court refused to consider any approach short of total disclosure of any arguably relevant materials. See *id.* at 111, 117 (A-39, A-51).¹⁰

Because the court below viewed the University's arguments in this case as "essentially the same" as those

9. The Court of Appeals also rejected the University's arguments that reversal was required on account of the District Court's unorthodox decision of the merits in advance of the threshold issue of comity, and its failure to state any reasons for its decision. A-16.

10. Certiorari was denied in *Franklin & Marshall* over the dissent of Justices White and Blackmun. 476 U.S. 1163 (1986).

made and rejected in *Franklin & Marshall*, the court affirmed enforcement of the subpoena. A-22.¹¹

The University's petition for rehearing *en banc* was denied on August 11, 1988.

REASONS FOR GRANTING THE WRIT

I. THE FRANKLIN & MARSHALL RULE, REAFFIRMED BY THE THIRD CIRCUIT IN THIS CASE, CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH DECISIONS OF THIS COURT.¹²

A. An Intractable Conflict in the Circuits Concerning the Discoverability of Confidential Peer Review Materials Should Be Resolved by This Court As Soon As Possible.

There now exists a longstanding conflict in the Circuits on the question of whether confidential academic peer review materials should be protected against compelled disclosure by the Commission and, if so, under what circumstances. The conflict itself, which is clear and apparently intractable, has been noted and lamented by virtually every court and commentator that has addressed the issue.¹³

11. The Court of Appeals also held that the University's argument that the subpoena in question was unenforceable since it was issued pursuant to a rule violating the Administrative Procedure Act, even if meritorious, could not bar enforcement of the subpoena. A remand, however, was ordered solely for consideration of the question whether names and identifying data of authors of peer review evaluations should be redacted.

12. For examples of other occasions on which this Court has reviewed a Court of Appeals decision which essentially adheres to an earlier decision by the same court, see, e.g., *Lyng v. Payne*, 476 U.S. 926 (1986); *United States v. Rodgers*, 466 U.S. 475 (1984).

13. See, e.g., *EEOC v. Franklin & Marshall College*, *supra*, 775 F.2d at 114 ("declin[ing] to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach"); *Gray v. Board of Higher Education*, 692 F.2d 901, 904 n.6 (2d Cir. 1982) (criticizing refusal to give peer

In the Third Circuit, peer review materials are afforded no protection from compelled disclosure upon request by the Commission, as long as they meet the minimal relevance standard articulated in *Franklin & Marshall* and reaffirmed by the Third Circuit in this case. The same standard applies in the Fifth Circuit, under *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), which holds that confidential tenure deliberations are not even covered by the First Amendment.

The Second, Fourth, and Seventh Circuits, on the other hand, all have adopted a more reasonable approach requiring a balancing of the competing interests. In *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), a discrimination suit brought under 42 U.S.C. §1981 by a disappointed tenure candidate, the

review materials any constitutional protection in *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982); *Rubin v. University of California*, 114 F.R.D. 1, 2-4 (N.D. Cal. 1986); *Zaustinsky v. University of California*, 96 F.R.D. 622, 624 & n.3 (N.D. Cal. 1983) (identifying four different positions adopted by other federal courts).

Many commentators — from both the academic and legal communities — also have decried the current situation of uncertainty and expressed hope that this Court would address the question soon. For example, one commentator complained of the unsettled state of the law in which "[e]ach case requires the reviewing court to reconcile an increasing number of equally relevant opinions [,]" and urged this Court to take advantage of the next opportunity to articulate clear guidelines for the lower courts. Recent Development, *A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?*, 40 Vand. L. Rev. 1397, 1430 (1987). See also Note, *Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions*, 28 B.C.L. Rev. 559, 559 (1987); Commentary, *The Qualified Academic Freedom Privilege: A Closer Look at EEOC v. University of Notre Dame*, 41 Ed. L. Rep. 1209, 1216 (1987) (noting the inconsistency of approaches taken by the courts of appeals and predicting that "trial and appellate courts will continue to struggle with the nearly irreconcilable interests involved" until this Court provides guidance); *Peer Review in Personnel Decisions: Disclosure and Confidentiality*, 9 Lex Collegii 1, 6 (1986).

Second Circuit adopted a "balancing approach" that requires a court to weigh a university's need for confidentiality against a plaintiff's need for evidence in a particular case.¹⁴ The court ruled that where evidence from confidential records is "essential to an element of plaintiff's case," or where no statement of reasons is given for a tenure denial, then the balance tips in favor of discovery. 692 F.2d at 906, 908.¹⁵

In *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983), the Seventh Circuit resolved the competing interests by recognizing "a qualified academic freedom privilege" for peer review materials. *Id.* at 337. Under the Seventh Circuit standard, the EEOC may compel the disclosure of relevant but confidential information upon a "substantial showing of 'particularized need' . . ." *Id.* at 338.

The Fourth Circuit also has endorsed a balancing of the University's interest in confidentiality against the need for evidence relevant to a charge of discrimination. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977). Under that decision, disclosure will be compelled when a university attempts to defend a denial of tenure on the basis of the confidential information at issue.

While the Ninth Circuit has not yet rendered a square holding on this issue, it has stated, in the context of providing guidance to a district court, that it agrees

14. The district court in *Gray* explicitly recognized a "qualified privilege" for tenure committee votes. See 692 F.2d at 902. While the Court of Appeals preferred not to characterize its rule as a "privilege," it did "adopt the balancing approach of the district court." *Id.*; see also *id.* at 904-05.

15. In dictum in an unpublished opinion, the Sixth Circuit has indicated its probable agreement with the Second Circuit's balancing approach. *Bergman v. Bowling Green State University*, 820 F.2d 1224 (6th Cir. 1987).

with the balancing approach of the Fourth Circuit. *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1347 (9th Cir. 1981).¹⁶

Thus, the decisions in the Courts of Appeals run the gamut from the Fifth Circuit's refusal even to recognize a First Amendment interest in peer review materials, to the Third Circuit's recognition of the constitutional interest at stake but failure to give it any weight, to the balancing of the competing constitutional and statutory interests by the Second, Fourth, and Seventh Circuits, and probably the Sixth and Ninth Circuits as well.

This Court's guidance at this juncture is urgently needed to resolve such a sharp conflict on such an important issue of federal law. The current lack of uniformity on the subject is disruptive to ongoing tenure review processes at colleges and universities across the nation. Even the courts that agree in principle on the need for a balancing approach differ in their respective views of circumstances that will justify some form of protection of confidential peer review materials. Accordingly, colleges and universities cannot conduct their tenure review processes with any degree of certainty. Moreover, individual academicians asked to give evaluations of tenure candidates do not know whether their evaluations will remain confidential, and therefore have

16. There also have been numerous district court decisions. See, e.g., *Orbovich v. Macalester College*, 119 F.R.D. 411 (D. Minn. 1988); *Lever v. Northwestern University*, No. 84 C 11025 (N.D. Ill. May 21, 1987); *Rubin v. Regents of the University of California*, 114 F.R.D. 1 (N.D. Cal. 1986); *Jackson v. Harvard University*, 111 F.R.D. 472 (D. Mass. 1986); *Paul v. Leland Stanford University*, 39 EPD ¶ 35, 918 (N.D. Cal. 1986); *Rollins v. Farris*, 108 F.R.D. 714 (E.D. Ark. 1985); *Zaustinsky v. University of California*, 96 F.R.D. 622 (N.D. Cal. 1983); *McKillop v. University of California*, 386 F. Supp. 1270 (N.D. Cal. 1975).

Some state courts also have joined the fray. See, e.g., *Dixon v. Rutgers University*, 110 N.J. 432, 541 A.2d 1046 (1988); *Cockrell v. Middlebury College*, 148 Vt. 557, 536 A.2d 547 (1987).

become less than candid or even reluctant to provide such evaluations.¹⁷

The time for this Court to provide a uniform rule on this question has come. When certiorari was denied in *Franklin & Marshall*, over the dissent of Justices White and Blackmun, the Commission had submitted that the conflict on this issue was "nascent at best, minor in any event, and likely to recede. . . ."¹⁸ But that statement was wrong then and certainly is wrong now. Since 1986, the debate has grown more vigorous and the calls for guidance from this Court more urgent. See notes 13, 16 & 17, *supra*.

The proliferation of views in the lower courts, moreover, while confusing to universities attempting to discern the law, will be helpful to this Court in its consideration of this important question. The issue has been debated at length in the scholarly journals as well as the courts,¹⁹ and any further percolation of views in the

17. This "chilling effect" was noted in Recent Development, *A Qualified Academic Freedom Privilege in Employment Litigation*, *supra*, 40 V and. L. Rev. at 1430. See also Note, *Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases*, 21 Suffolk U.L. Rev. 691, 712 (1987).

Different rules apply not only to different institutions and scholars, depending on the fortuity of geography, but also to a particular scholar depending on the circumstances. A professor at the University of Pennsylvania might write a candid and critical evaluation of a peer being considered for tenure at Columbia University or the University of Chicago, only to find himself unwilling to give the same candid evaluation at a later date when the same individual turns up and is being considered for tenure at Penn.

18. Brief for the Equal Employment Opportunity Commission in Opposition, *Franklin & Marshall College v. EEOC*, No. 85-1439, at 5.

19. In addition to the articles cited in notes 13 & 17, *supra*, see, e.g., Brown, *The Confidential Peer Review Process at Institutions of Higher Education: A Case for the Use of a Balancing Test*, 41 Ed.

lower federal courts, far from improving the brew, will merely waste scarce judicial resources. The Nation's institutions of higher learning, their faculty members, and the EEOC deserve a ruling from this Court as soon as possible.

B. The Third Circuit's Decisions Conflict With This Court's First Amendment Decisions.

The Third Circuit's reaffirmation of *Franklin & Marshall* conflicts with this Court's First Amendment decisions in both analysis and result. Furthermore, the Third Circuit's reading of Title VII in a way that creates a constitutional problem violates this Court's settled rules of statutory construction.

1. The Third Circuit's decision is inconsistent with this Court's First Amendment decisions in that it fails to give *any* constitutional protection to activities clearly covered by the First Amendment. The Third Circuit paid lip service to the fact that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment," *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.), and to the fact that among the "four essential freedoms" of a university is the freedom "to determine for itself on academic grounds who may teach." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J.,

L. Rep. 421 (1987); DeLano, *Discovery in University Employment Discrimination Suits; Should Peer Review Materials Be Privileged?*, 14 J. Coll. & Univ. L. 121 (1987); Fishbein, *New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities*, 12 J. Coll. & Univ. L. 381 (1985); Kluger, *Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response*, 15 J.L. & Educ. 319 (1988); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538 (1981); Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 Wash. U.L.Q. 445 (1987).

concurring in the result). See 775 F.2d at 114 (A-44 to A-45). Moreover, the court agreed that "the system of peer review by confidential evaluations and recommendations of tenured faculty" is "central" to the determination of "who may teach" and is "the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Id.* (citation omitted).

But the court brushed aside these well-founded and longstanding constitutional rights and societal interests, giving them no weight at all against the EEOC's statutory interest in conducting its investigations. The Third Circuit's decision, which permits an investigation to impinge on protected First Amendment activities upon a minimal showing of relevance, conflicts with this Court's holdings that such an infringement is prohibited unless the government can show a compelling interest that cannot be served by alternative means. See, e.g., *Sweezy v. New Hampshire*, *supra*; *Gibson v. Florida Legislative & Investigative Comm.*, 372 U.S. 539, 546, 557 (1963). As this Court emphasized in *Sweezy*:

It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech . . . and freedom of communication of ideas, particularly in the academic community. 354 U.S. at 245.

The Third Circuit's decision, which does not even attempt to balance the competing interests, let alone to circumscribe carefully the Commission's investigative authority, cannot be squared with this Court's decisions.

2. The Third Circuit's method of statutory construction also conflicts with this Court's admonition that statutes are to be construed, where possible, to avoid constitutional problems. See, e.g., *Lowe v. SEC*, 472 U.S. 181, 189-90 (1985); *NLRB v. Catholic Bishop*, 440 U.S.

490, 507 (1979). If this Court's settled principle of statutory construction had been followed, the Third Circuit would have looked for clear evidence of Congress' intent to infringe protected First Amendment interests before construing the statute to require such a result. Instead, the Third Circuit "look[ed] . . . for evidence that Congress intended that special treatment be accorded academic institutions *under investigation* for discrimination and [found] none." 775 F.2d at 115 (A-47) (emphasis in original). In interpreting Congress' silence as authorization of an infringement of protected First Amendment interests, the Court of Appeals' decision created a constitutional problem where one could have been avoided, in conflict with this Court's settled principles.²⁰

II. THE THIRD CIRCUIT'S DECISION ON THE UNIVERSITY'S MOTION TO DISMISS CONFLICTS IN PRINCIPLE WITH A DECISION OF THIS COURT AND CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. The Decision Below Conflicts in Principle With This Court's Decision in *Piper Aircraft Co. v. Reyno*.

In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), this Court reviewed a decision of the Third Circuit which held that a district court could not dismiss an action on grounds of *forum non conveniens* "where the law of the alternative forum would be less favorable to the plaintiff than the law of the forum chosen by the plaintiff." *Id.* at 238. This Court reversed, concluding

20. Moreover, the Court of Appeals' failure to consider the unique place of academic institutions in American history and society and the special problems faced by those institutions conflicts with this Court's recognition that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980) (citation omitted.)

that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247 (emphasis added); see also *id.* at 238. Moreover, this Court's ruling was not affected by the fact that in moving to dismiss the case, the defendants in *Piper Aircraft* "may [have been] engaged in reverse forum-shopping." *Id.* at 252 n. 19. "[T]his possibility ordinarily should not enter into a trial court's analysis" in exercising its discretionary authority. *Id.*

The decision below conflicts in principle with the reasoning of *Piper Aircraft*. Here, the Third Circuit once again blocked an otherwise appropriate dismissal on the ground that dismissal *might* result in a change in the law unfavorable to the party — here the Commission — that wanted to be in the Third Circuit. The Third Circuit's decision in this case is, in fact, worse than its decision in *Piper Aircraft*, since (1) here the University had a previously-filed action already pending in another federal court, and (2) the "local law" that the Third Circuit insisted on applying is not "local law" at all, but rather one court's interpretation of *federal* law which the federal courts in the District of Columbia can apply equally well. While this case involves duplicative actions and *Piper Aircraft* involved *forum non conveniens* factors, both cases involve discretionary considerations in ruling on motions to dismiss; and to the extent that the Third Circuit here used the same single inappropriate factor to block an otherwise appropriate dismissal, its decision conflicts in principle with this Court's decision in *Piper Aircraft*.

B. The Third Circuit's Decision Calls for the Exercise of This Court's Supervisory Power.

Under well-settled principles of comity between co-equal federal courts, a district court should refrain from exercising its jurisdiction when another federal court is first possessed of jurisdiction over another action

raising substantially the same issues. See, e.g., *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180 (1952); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); *West Gulf Maritime Ass'n v. ILA*, 751 F.2d 721 (5th Cir. 1985), *cert. denied*, 474 U.S. 844 (1985). A court's decision whether or not to retain jurisdiction admittedly is committed to its sound discretion; but discretion is not a meaningless concept. It must be exercised according to accepted guidelines, cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), relating in this context to a proper respect for coordinate courts. In the rare event of an abuse of discretion, "there is always the opportunity for corrective review by a Court of Appeals and ultimately by this Court." *Kerotest Mfg.*, *supra*, 342 U.S. at 185 (emphasis added). This case calls for review by this Court to provide guidance to the lower courts as to when, if ever, duplicative litigation may be countenanced, and to review the Third Circuit's departure from the standards applied in other circuits in this situation.

The Third Circuit approved the District Court's retention of jurisdiction in this case — in the face of the pending action in the District of Columbia — on the ground that the normal principles of comity between federal courts "should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent enforcement action." A-18. This exception, however, is of necessity based on a court's perception of a party's motivation and, even if based on an accurate perception, would soon swallow up the general rule. In virtually every case involving the first-filed rule, *both* parties are attempting to obtain some advantage by their respective forum choices. After all, the Commission in this case need not have brought an independent enforcement action in the Eastern District of Pennsylvania; it could have counterclaimed for enforcement in the District of Columbia action. The fact that a party has reasons for preferring one forum to

another does not justify an exception to the first-filed rule; indeed, it is the reason for the rule.

Moreover, the University's decision in this case to challenge the Commission's national policy in the Commission's home forum, where the challenged policy was formulated, hardly can be considered objectionable. Even if the University believed its chances of prevailing were better in one court than another, it should not be penalized for its choice unless the choice was inappropriate in terms of jurisdiction, venue, or factors of convenience. Where the court in the first-filed action explicitly refuses to stay, dismiss, or transfer the action, it thereby confirms that the original plaintiff's choice of forum is unobjectionable and should not be disturbed. A decision by the second court to retain jurisdiction nonetheless, because of its objection to the original plaintiff's choice of forum, undermines the jurisdiction of the co-equal federal court in the first-filed action. As the court below itself recognized in this case, allowing the second action to proceed "could lead to the anomalous result of the District of Columbia judge declaring the EEOC subpoena policy unconstitutional or unenforceable, but this court nevertheless ordering it to comply with the Eastern District of Pennsylvania judge's order enforcing the subpoena." A-8 to A-9.

For these reasons, other Courts of Appeals have concluded not only that the second filed action should be dismissed, *e.g.*, *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *Washington Metropolitan Area Transit Authority v. Rangone*, 617 F.2d 828, 830 (D.C. Cir. 1980), but that it must be dismissed. *West Gulf Maritime Ass'n*, *supra*, 751 F.2d at 728, 730. The Third Circuit's departure from the approach of the other circuits serves no salutary purpose; rather, its rule simply shifts the right to choose the forum from the first plaintiff to the second plaintiff, and in effect grants the transfer motion that was never presented timely to the first federal court. Thus, the

decision could have the effect of encouraging defendants to substitute filings of duplicative actions for transfer motions. This would undermine both the jurisdiction of the original court and the settled body of law governing transfer motions under 28 U.S.C. § 1404(a). Thus, the Third Circuit's aberrant rule warrants review by this Court.²¹

21. The Court of Appeals also sanctioned the District Court's failure to state any reasons for its departure from the first-filed rule, and its refusal to consider the University's threshold motion to dismiss before granting enforcement of the Commission's subpoena. The Court of Appeals' sanctioning of these gross departures from the accepted course of judicial proceedings also calls for the exercise of supervision by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

Shelley Z. Green
Neil J. Hamburg
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA
19104
(215) 898-7660

Steven B. Feirson
(Counsel of Record)
Alan D. Berkowitz
Nancy J. Bregstein
DECHERT PRICE &
RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000

Counsel for Petitioner

September 19, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1547

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

UNIVERSITY OF PENNSYLVANIA

The Trustees of the
University of Pennsylvania
Appellant

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Miscellaneous No. 87-0294)

Argued February 25, 1988

Before: BECKER, HUTCHINSON, and SCIRICA,
Circuit Judges

(Filed June 23, 1988)

STEVEN B. FEIRSON, ESQ. (Argued)
ALAN D. BERKOWITZ, ESQ.
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102

Attorneys for Appellant

LAMONT N. WHITE, ESQ. (Argued)
 Appellate Division-
 Office of General Counsel
 Equal Employment Opportunity
 Commission
 2402 E Street, N.W., Room 224
 Washington, D.C. 20507

Attorneys for Appellee

OPINION OF THE COURT

SCIRICA, Circuit Judge.

Nearly fifty years ago, this court adopted what has become known as the "first-filed" rule. We concluded that "[i]n all cases of federal concurrent jurisdiction, the court which first has possession of the subject must decide it." *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941) (quoting *Smith v. McIver*, 22 U.S. (9 Wheat.) 532 (1824)), cert. denied, 315 U.S. 813 (1942). Since then, this policy of comity has served to counsel trial judges to exercise their discretion by enjoining the subsequent prosecution of "similar cases . . . in different federal district courts." See generally *Compagnie Des Bauxites De Guinée v. Insurance Co. of North America*, 651 F.2d 877, 887 n.10 (3d Cir. 1981), cert. denied, 457 U.S. 1105 (1982); see also *Berkshire Intern. Corp. v. Marquez*, 69 F.R.D. 583, 586 (E.D.Pa. 1976) ("It has long been the policy of our Circuit Court that absent unusual circumstances" the first-filed rule applies in cases of concurrent federal jurisdiction); accord *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) ("federal courts have long recognized that . . . comity requires federal district courts . . . to exercise care to avoid interference with each other's affairs.").

This appeal requires us to revisit the first-filed rule. We must determine whether the rule bars a district judge in the Eastern District of Pennsylvania from enforcing a subpoena issued by the Equal Employment Opportunity Commission ("EEOC") to an employer, the University of Pennsylvania ("the University"), which has already filed in the district court for the District of Columbia a constitutional challenge to the national policy authorizing the EEOC subpoena. The University contends that the district judge in the Eastern District of Pennsylvania abused his discretion by declining to dismiss the EEOC's enforcement suit in favor of the University's earlier constitutional challenge.

The first-filed rule encourages sound judicial administration and promotes comity among federal courts of equal rank. It gives a court "the power" to enjoin the subsequent prosecution of proceedings involving the same parties and the same issues already before another district court. See *Triangle Conduit & Cable Co. v. National Elec. Products Corp.*, 125 F.2d 1008, 1009 (3d Cir.), cert. denied, 316 U.S. 676 (1942). That authority, however, is not a mandate directing wooden application of the rule without regard to rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping. District courts have always had discretion to retain jurisdiction given appropriate circumstances justifying departure from the first-filed rule. See *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 130 F.2d 474, 475-76 (3d Cir.), cert. denied, 317 U.S. 681 (1942); accord *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 423-24 & n.4 (2d Cir. 1965); cf. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (no precise rule governs relations between federal district courts possessing jurisdiction, but

general principle is to avoid duplicative litigation); *Kline v. Burke Constr. Co.*, 260 U.S. 228, 229 (1922) (forbearance exercised by coordinate federal courts is discretionary) (quoting *Covell v. Heyman*, 111 U.S. 176, 182 (1884)).

Therefore, we review the district court's order for abuse of discretion. *Crosley*, 122 F.2d at 927; see also *United States v. Criden*, 648 U.S. 814, 817 (3d Cir. 1981); *Pacesetter Systems*, 678 F.2d at 95 & n.1. We hold that the district court did not abuse its discretion by declining to invoke the first-filed rule to dismiss the EEOC's enforcement action. When the University filed the first suit in the District of Columbia Circuit, it knew the EEOC's enforcement action in the Eastern District of Pennsylvania was imminent, and that precedent in this Circuit, see *E.E.O.C. v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986), might favor resolution of the dispute in favor of the EEOC. Under these circumstances, and in light of the purposes of Title VII of the Civil Rights Act of 1964, the first-filed rule does not govern this case.

In addition, we will affirm, for reasons other than those stated by the district court, the order denying the University's request to raise its defenses at the subpoena enforcement stage. We will remand, however, on the issue whether the University should be entitled to produce redacted records.

I. Facts and Proceedings

The facts are undisputed. In 1985, the University denied tenure to Rosalie Tung, a junior member of the faculty of the University's Wharton School. Tung then filed charges with the EEOC, alleging that the denial was based on her race (Asian) and on her sex (female). As a result of the EEOC's investigation, the University supplied a wide range of documents, but declined to

release confidential peer review materials relating to the tenure review process for Tung and the five other male candidates under consideration. The EEOC then issued a subpoena seeking:

1. Copies of Tung's tenure file;
2. Copies of the tenure file for the five other candidates considered with Tung for tenure;
3. The identity, tenure status, and qualifications of those individuals who comprised the tenure committees for the University's management department from June, 1984 to the present; and
4. The identity of all members of the University's personnel committee.

J.A. at 3 (EEOC subpoena).

The University requested the EEOC to balance its need for access to investigative materials with the University's "important societal and constitutional interests in preserving the integrity of the peer review process." J.A. at 9. This balancing, the University maintained, would require the EEOC to modify the subpoena to exclude confidential peer review material. *Id.* at 8-9. The EEOC denied this request on April 10, 1987, concluding that: (1) the peer review information was necessary to determine whether Tung was treated differently from those who received tenure; and (2) this court's decision in *Franklin & Marshall* required it to reject the University's argument that principles of academic freedom created a qualified privilege protecting universities from disclosing tenure review information to the EEOC. J.A. at 11-14. The EEOC notified the University that unless it responded to the subpoena within twenty days of receiving the agency decision, subpoena enforcement proceedings would be initiated. *Id.* at 14.

The University received the EEOC decision on April 14, 1987; thus, the twenty-day grace period expired on May 4, 1987. On May 1, 1987 – three days before expiration of the grace period – the University responded by filing suit for declaratory judgment and injunctive relief in the district court for the District of Columbia. The University claimed the EEOC had violated the first and fifth amendments, see U.S. Const. amend. I, V, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553 (1982), by adopting a policy that, in practice, constituted a nationwide rule requiring complete disclosure of confidential peer review materials. See J.A. at 148, 153-54, 157.¹ Count IV of the University's complaint explicitly requested the court to quash the subpoena issued by the EEOC's Philadelphia office. *Id.* The University said it filed suit in Washington, D.C., rather than Philadelphia.

1. The University's APA claim is that the EEOC adopted a rule of "total and absolute disclosure by colleges and universities of all peer review materials used in making tenure decision." J.A. at 148, 154. The basis for the University's contention that an EEOC "rule" exists is the EEOC's April 10, 1987 refusal to modify the University's subpoena. In its complaint in the District of Columbia, the University alleged:

In rendering its determination in plaintiff's petition to modify the subpoena, the EEOC made clear that it has rejected any balancing approach and is seeking information through its subpoena policies without giving weight to the constitutional and societal interests which underlie the peer review process.

By taking the above action, defendant has affected important substantive rights and has violated the Administrative Procedure Act by engaging in rule making without complying with the advance publication and opportunity for public participation requirements of 5 U.S.C. Section 553.

Id. at 157-58 (Complaint ¶¶ 48, 49).

because "more was at stake than the single question of the Commission's possible enforcement of the its subpoena against the University." Brief for Appellant at 6.

The EEOC instituted its subpoena enforcement action on June 19, 1987 in the Eastern District of Pennsylvania. At that point, therefore, each party had filed suit relating to the validity of the EEOC subpoena, but the suits were pending in different federal district courts. Citing our decision in *Crosley*, the University sought dismissal of the enforcement action in favor of its previously filed suit in the District of Columbia. In the event the action was not dismissed on comity grounds, the University requested an opportunity to raise its constitutional and APA defenses when the Eastern District of Pennsylvania court considered the subpoena enforcement question. It then sought discovery to support those claims. The EEOC opposed the discovery requests, arguing that the constitutional and APA issues could not be considered in the enforcement action.

The Eastern District of Pennsylvania judge heard oral argument July 2, 1987 on the University's motion to dismiss. See J.A. at 44-76 (transcript of oral argument). The trial judge posited that the University filed the first action in the District of Columbia to avoid an adverse decision in this circuit based on *Franklin & Marshall*:

As I see it, ... we have ... a case on point ... and maybe you were looking somewhere else, that you thought might result in something different than they did ... in the Third Circuit. That is possible, isn't it? ... Isn't that why you did it?

J.A. at 55-56. The University's counsel responded that avoidance of *Franklin & Marshall* "may have been a consideration ... but we did not choose a forum that

was inappropriate for the action that we brought." *Id.* at 56; accord Transcript of Oral Argument at 4, 5 (3d Cir. February 25, 1988). On September 1, 1987, the Eastern District of Pennsylvania judge denied the motion to dismiss, ordered the University to comply with the subpoena within ten days, and denied the University's discovery requests.²

Meanwhile, the University's parallel suit in the District of Columbia continued to proceed in due course. On September 3, 1987, the District of Columbia judge denied the EEOC's motion to dismiss the University's complaint for lack of jurisdiction, improper venue, and failure to state a claim. Although the EEOC never filed a motion to transfer that action to the Eastern District of Pennsylvania, it did seek to stay the District of Columbia action pending resolution of this appeal. The University opposed the stay, arguing that even if we affirm the Eastern District of Pennsylvania judge's September 1 order, those proceedings have been so confined that they will not dispose of all or a substantial portion of the subject matter pending before [the District of Columbia] court." Supp. J.A. at 360. The District of Columbia judge denied the stay.

II. Discussion

The parties are now confronted with a situation in which the Eastern District of Pennsylvania judge has declined to dismiss the enforcement action in favor of the first-filed constitutional challenge, and the District of Columbia judge has declined to stay the constitutional challenge pending appeal of the second-filed enforcement action. The University observes that the present procedural posture could

2. This court grant a stay on October 16, 1988, pending appeal of the district court's order.

lead to the anomalous result of the District of Columbia judge declaring the EEOC subpoena policy unconstitutional or unenforceable, but this court nevertheless ordering it to comply with the Eastern District of Pennsylvania judge's order enforcing the subpoena.

To be sure, this is the type of situation that prompted the first-filed rule. "It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals." *Crosley*, 122 F.2d at 930. Comity must serve as a guide to courts of equal jurisdiction to exercise forbearance to avert conflicts and to avoid "interference with the process of each other." *Kline*, 260 U.S. at 229. The potential conflict, however, is of the University's own making. Indeed, it must have anticipated this problem when it decided to preempt an inevitable subpoena enforcement action by filing suit three days before expiration of the EEOC grace period in what it perceived as a more favorable forum. Resolution of this knotty issue of federal jurisprudence must begin with an examination of our decision in *Franklin & Marshall*.

A. *Franklin & Marshall*

In *Franklin & Marshall*, this court was confronted with a district court's order enforcing an EEOC subpoena for confidential peer review records relating to a denial of tenure to a college instructor. 775 F.2d at 111. The appellant *Franklin & Marshall College* contended that the court should recognize a constitutionally based "qualified academic peer review privilege" that would prevent disclosure of confidential peer review material absent a showing of an inference of discrimination." *Id.* at 113. We recognized that two

other courts of appeals -- the Second and Seventh Circuits -- had adopted either the privilege or a balancing approach. *Id.* (citing *E.E.O.C. v. University of Notre Dame*, 715 F.2d 331, 337-38 (7th Cir. 1983) (qualified privilege); *Gray v. Board of Higher Educ. City of New York*, 692 F.2d 901, 904-05 (2d Cir. 1982) (balancing test)). Moreover, we acknowledged that the EEOC's position would burden the tenure review process and would impact on academic freedom, which is "a special concern of the First Amendment." *Franklin & Marshall*, 775 F.2d at 114, 115 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

Nevertheless, we declined to create a similar exception for academic institutions, concluding that Congress delivered a "clear mandate" subjecting academic institutions to the express requirements of Title VII. *Franklin & Marshall*, 775 F.2d at 114, 115 (examining legislative history of Title VII). Congress, we noted, had "identified and recognized the threat of unchecked discrimination in education" *Id.* at 115. Adoption of a qualified privilege or balancing test would permit universities to avoid EEOC investigation and allow them "to hide evidence of discrimination behind a wall of secrecy." *Id.*

Moreover, we explained why the confidential peer review records are relevant to an investigation of discrimination in the tenure context:

[A]n alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorandum which the appellant seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a

similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears [T]he peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.

Id. at 116 (footnotes and citations omitted). Thus, in *Franklin & Marshall*, this court expressly declined to limit the EEOC's subpoena authority to accommodate an academic institution's constitutional right to academic freedom. The University contends that *Franklin & Marshall* did not, however, consider the precise claims alleged by the University in this case: i.e., that the EEOC has instituted a subpoena policy in violation of the APA, and that the EEOC acted in an unconstitutional manner by refusing, as a matter of national agency policy, to recognize the special status of academic institutions.

B. The University's Claim

Our holding in *Franklin & Marshall* apparently prompted the University to initiate its constitutional challenge in a more friendly forum. See J.A. at 56 (transcript of oral argument in the Eastern District of Pennsylvania); see also Part I, *supra*. Indeed, although the District of Columbia Circuit has not addressed the issue of academic freedom and EEOC subpoenas, the University perceives the District of Columbia Circuit as favoring its position. See J.A. at 291, 361 (citing *Greenya v. George Washington Univ.*, 512 F.2d 556, 563 (D.C. Cir.), cert. denied, 423 U.S. 995 (1975)). That fact, however, is not dispositive.

As the University points out, it was legally entitled to file suit in the District of Columbia. Moreover, venue provisions for suits contesting administrative action

generally create the availability of multiple forums. R. Pierce, S. Shapiro & P. Verkuil, *Administrative Law & Process* § 5.6, at 175-76 (1985); see also McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. Pa. L. Rev. 302, 304 (1980) ("venue provisions of individual agency statutes commonly allow for review in several possible circuits.")

The University contends that its suit was properly filed pursuant to 28 U.S.C. § 1391(e). That provision provides that "[a] civil action in which a defendant is ... an agency of the United States ... may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the actions resides, or (2) the cause of action arose" *Id.* Because the EEOC's headquarters is in Washington, D.C., see 42 U.S.C. § 2000e-4(f), the University maintains that it properly instituted suit on the subpoena policy in the District of Columbia. Moreover, it notes, Washington, D.C. is where the EEOC's rule was promulgated and where the documents and other discovery relevant to the University's claim is located. The University contends that by refusing to dismiss the second-filed suit based on notions of comity, the Eastern District of Pennsylvania judge abused his discretion.

The EEOC, meanwhile, contends that the first-filed suit in the District of Columbia was "an obvious attempt to preempt the filing of a Commission subpoena enforcement action in the Eastern District of Pennsylvania and to evade unfavorable controlling Third Circuit precedent The University seeks to reap the benefits of its unabashed forum-shopping by arguing that concerns of 'comity' required dismissal of the EEOC's suit." Brief of EEOC as Appellee, at 10.

By maintaining it was entitled to file in the District of Columbia district court, the University misses the point. We do not dispute that under most

circumstances, the District of Columbia suit was properly filed; i.e., venue and jurisdiction were proper.³ See 28 U.S.C. § 1391(e). For that matter, the EEOC's Eastern District of Pennsylvania subpoena action was also properly filed. Indeed, Title VII arguably contemplates the Eastern District of Pennsylvania as the more appropriate forum – at least for Count IV (motion to quash the EEOC subpoena) of the University's complaint. Title VII provides:

[Actions brought under this subchapter] may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office

42 U.S.C. § 2000e-5(f)(3).

Thus, at least with respect to the allegation concerning the subpoena, which sought records relevant to an alleged violation in Philadelphia (Count IV), that action, standing alone, would be more properly brought in the Eastern District of Pennsylvania. These jurisdictional guideposts, however, fail to resolve the difficult issue of federal comity. Although a portion of the District of Columbia action presents the identical issue raised in the

3. The District of Columbia judge so held. See J.A. at 347 (denying the EEOC's motion to dismiss the District of Columbia suit).

Eastern District of Pennsylvania action, both actions were properly filed.⁴ The dispositive issue, therefore, is whether Eastern District of Pennsylvania judge abused his discretion by refusing to dismiss the second-filed suit in favor of the first-filed District of Columbia action.

The University asserts that the district court must always exercise its discretion by dismissing the second-filed action. Under the University's view, the first-filed rule is a firm legal principle requiring dismissal of the second-filed suit without regard to the circumstances of the case. We disagree.

Although exceptions to the rule are rare, courts have consistently recognized that the first-filed rule "is not a rigid or inflexible rule to be mechanically applied" *Pacesetter Systems*, 678 F.2d at 95; accord *Westcott v. United States Dept. of Agriculture*, 765 F.2d 121, 121 (8th Cir. 1985). Bad faith, see *Crosley Corp.*, 130 F.2d at 476; *Berkshire*, 69 F.R.D. at 588, and forum shopping have always been regarded as proper bases for departing from the rule. See *Mattel, Inc.*, 353 F.2d at 424 n.4 (citing *Rayco Mfg. Co. v. Chicopee Mfg. Co.*, 148 F. Supp. 588, 592-94 (S.D.N.Y. 1957)); *Berkshire*, 69 F.R.D. at 588. Similarly, courts have rejected the rule when the second-filed action had developed further than the initial suit, see *Wescott*,

4. We are puzzled by the EEOC's failure to move to transfer, see 28 U.S.C. § 1404 (1982), or stay the District of Columbia proceeding in favor of the Eastern District of Pennsylvania suit. See generally *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 724, 729 n.1 (5th Cir. 1985) ("In addition to outright dismissal, it sometimes may be appropriate to transfer the action or to stay it."). Although a transfer or stay would have avoided this jurisdictional dispute, a remand to address these issues would serve no purpose here given the procedural stage of the District of Columbia suit, and the additional delay it would impose on the resolution of Ms. Tung's Title VII charge.

765 F.2d at 121; *Church of Scientology v. United States Dept. of Army*, 611 F.2d 738, 749-50 (9th Cir. 1979), and when the first-filing party instituted suit in one forum in anticipation of the opposing party's imminent suit in another, less favorable, forum. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 217, 219 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); see also *Ven-Fuel, Inc. v. Department of the Treasury*, 673 F.2d 1194, 1195 (11th Cir. 1982) (first filing not controlling when it was made "in apparent anticipation of imminent judicial proceedings" by opposing party); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 760, 761 (E.D. Va. 1986) ("foremost among [the] equitable considerations are the timing and circumstances surrounding the filing of" the first suit); *Consolidated Rail Corp. v. Grand Trunk Western Railroad Co.*, 592 F. Supp. 562, 568, 569 (E.D. Pa. 1984).

The letter and spirit of the first-filed rule, therefore, are grounded on equitable principles. See *Columbia Plaza Corp. v. Security Nat. Bank*, 525 F.2d 620, 621 (D.C. Cir. 1975); cf. *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 183-84 (1952) (under Federal Declaratory Judgments Act, factors relevant to wise judicial administration between coordinate federal courts "are equitable in nature"). To be sure, the rule's primary purpose is to avoid burdening the federal judiciary and to prevent the judicial embarrassment of conflicting judgments. *Church of Scientology*, 611 F.2d at 750; *Crosley Corp.*, 122 F.2d at 930. Yet, fundamental fairness dictates the need for "fashioning a flexible response to the issue of concurrent jurisdiction." *Church of Scientology*, 611 F.2d at 750.

In exercising his discretion, the trial judge was bound to acknowledge these principles. "The term 'discretion' denotes the absence of a hard and fast

rule." *Langnes v. Green*, 282 U.S. 531, 541 (1931) (citing *The Styria v. Morgan*, 186 U.S. 1, 9 (1902)); *Criden*, 648 F.2d at 817 ("discretion of the trial court ... means merely that the decision is uncontrolled by fixed principles or rules of law."). Under this standard, a court must act "with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Langnes*, 282 U.S. at 541. The decision to exercise jurisdiction in this context requires the trial judge to possess "the flexibility necessary to fit the decision to the individualized circumstances." *Criden*, 648 F.2d at 818.

The University contends that the record is devoid of any evidence of bad faith with respect to its decision to file suit in the District of Columbia. It notes that the district court's order includes no such finding,⁵ and that venue was proper in the District of Columbia.

Nevertheless, viewing the totality of the circumstances, the district court did not abuse its discretion by declining to dismiss the second-filed suit. The timing of the University's filing in the District of Columbia indicates an attempt to preempt an imminent subpoena enforcement in the Eastern District of Pennsylvania. When it denied the University's request to modify the subpoena based on

5. A written statement setting forth reasons for the trial court's exercise of discretion: (1) helps appellate courts determine that relevant factors were considered and given appropriate weight; and (2) discourages reversal on the ground that appellate judges might have decided differently had they been the original decisionmakers. *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

For purposes of this appeal, however, the district court record -- particularly the oral argument transcript -- provides an adequate means of discerning the factors and reasons underlying the district court's ruling. See *Adams v. Gould, Inc.*, 739 F.2d 858, 863 (3d Cir. 1984), cert. denied, 469 U.S. 1122 (1985).

first amendment considerations, the EEOC threatened to institute a subpoena enforcement proceeding within twenty days unless the University responded. Instead of complying with the ruling or notifying the EEOC of its intent to contest the ruling, the University filed suit in the District of Columbia three days before the expiration of the grace period during which the EEOC stated it would not resort to a judicial enforcement proceeding.⁶

Moreover, the University has acknowledged that our decision in *Franklin & Marshall* presented a problem with respect to its plan to contest the EEOC's refusal to modify the subpoena to recognize first amendment considerations of academic freedom. Even if this factor, standing alone, were insufficient to justify departure from the first filed rule, when viewed through the factual prism of this proceeding, the University's effort to evade a decision in this Circuit violates the equitable basis for the rule, and creates several problems that cannot be ignored.

If, as the University believes, the District of Columbia Circuit will refuse to enforce subpoenas demanding peer review records, litigants from throughout the country will avoid local enforcement actions by first obtaining a favorable ruling in the District of Columbia. This would undermine our precedent⁷ and "improperly 'subordinate a regional circuit,'" see *Chabal v. Reagan*, 822 F.2d 349, 355 (3d

6. J.A. at 14. Title VII includes no time limit within which parties must respond to agency subpoenas. The EEOC grants issuing officials discretion in granting extensions to permit subpoena compliance. See J.A. at 132 (EEOC Compliance Manual § 24.5(a)).

7. "Adherence to precedent must ... be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts." B. Cardozo, *The Nature of the Judicial Process* 34 (1921).

Cir. 1987), by establishing the District of Columbia as a super court of appeals. There is no indication that Congress intended the District of Columbia courts to play such a pivotal role in Title VII enforcement. When Congress intends a court of appeals to possess such authority, it explicitly so provides. See, e.g. 29 U.S.C. § 160(f) (1982) (final orders of National Labor Relations Board may be reviewed by any court of appeals where unfair labor practices occurred, or where the aggrieved party resides or transacts business, or in the District of Columbia Circuit); 28 U.S.C. § 1295(a)(1) (1982) (Federal Circuit has exclusive jurisdiction over appeals of patent and trademark cases)

Although the University characterizes its District of Columbia filing as a broad first amendment challenge to the EEOC's national policy, its complaint, see Count IV, features a direct challenge to the EEOC subpoena: (1) issued in Philadelphia; (2) for records held by the University; and (3) relating to a discrimination charge arising at the University. The University's conduct following the issuance of the EEOC's subpoena, therefore, created "a lamentable spectacle," which was "tantamount to the blowing of a starter's whistle in a foot race." See *Rayco*, 148 F. Supp. at 592; accord *Tempco Elec. Heater Corp. v. Omega Engineering*, 819 F.2d 746, 750 (7th Cir. 1987) (rigid first-filed rule "will encourage an unseemly race to the courthouse and, quite likely, numerous unnecessary suits."); *Grand Trunk*, 592 F. Supp. at 568-69. Because the first-filed rule is based on principles of comity and equity, it should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action.

Our holding is further supported by two themes emphasized by Congress when it enacted Title VII. First, Title VII requires the prompt resolution of

claims. It establishes strict time limits on the processing of charges, the assignment of district judges to hear cases, and the scheduling of district court hearings "at the earliest practicable date." See 42 U.S.C. §§ 2000e-5(f)(1)-(5). District judges are duty-bound "to cause the case to be in every way expedited." *Id.* § 2000e-5(f)(5). The EEOC's subpoena power, see *id.* § 2000e-9, enables it to fulfill its investigative role and obtain information needed to determine whether there is reasonable cause to believe a charge is true. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595, 596 (1981). Upholding the University's first-filed suit in this context would undermine the congressional policy favoring prompt resolution of discrimination claims.

Second, the EEOC is charged with a duty to resolve discrimination disputes by conciliation. See 42 U.S.C. § 2000e-5(b) ("the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion"); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. at 595 & n.5. Upholding the University's action in this case would undermine this congressional goal. For example, instead of attempting to resolve a dispute in good faith, the EEOC and an employer in this Circuit would engage in pro forma discussions with an eye toward winning the race to the courthouse in the most favorable forum.

The purposes of Title VII, along with this Court's precedent and the principles underlying the first-filed rule, are better served by rejecting the University's effort to dismiss the second-filed suit. We emphasize, however, that invocation of the rule will usually be the norm, not the exception. Courts must be presented with exceptional circumstances before exercising their discretion to depart from the first-filed rule. The district court properly relied on such circumstances

here. Accordingly, we will affirm the district court's decision to deny the University's motion to dismiss.

C. The University's Constitutional and APA Defense

Resolution of the first-filed rule issue, however, does not end our inquiry. The University contends that by upholding all aspects of the district court's order, we would be forcing the University to litigate the subpoena enforcement issue without an opportunity to raise possible constitutional and APA defenses. The EEOC, meanwhile, has consistently maintained that the University's defenses cannot be raised in a summary subpoena enforcement action. It contends that courts should not permit a party to use dilatory discovery tactics to delay subpoena enforcement actions. Brief of EEOC as Appellee at 21 (citing *In re EEOC*, 709 F.2d 392, 400 (5th Cir. 1983)). In addition, the EEOC notes, as it did before the district court, that the University's constitutional and APA defenses are already before the District of Columbia court. Thus, the EEOC maintains, when deciding a subpoena enforcement action, the court must simply determine whether the information is relevant. The Eastern District of Pennsylvania judge agreed.

When the University sought discovery to support its first amendment and APA defenses, the district court denied the request, observing that the "asserted defenses ... are an improper response to an application to enforce an administrative subpoena." J.A. at 144 (order of Sept. 1, 1987). The court then denied the University's motion to dismiss and ordered the University to comply with the subpoena. *Id.* at 145.

We do not dispute the proposition that dilatory discovery tactics must not be interposed to delay a subpoena enforcement action. The district court,

however, did not base its decision on this ground, and the EEOC made no showing to support such an assertion. Instead, the court concluded that the first amendment and APA defenses were improper responses to the enforcement action. In effect, the court determined, as long as the subpoena sought relevant information, it must be enforced. Because this portion of the court's order rested on the application of legal principles, our review is plenary. *In re Remington Rand Corp.*, 836 F.2d 825, 828 (3d Cir. 1988); *Adams v. Gould, Inc.*, 739 F.2d 858, 864 (3d Cir. 1984), cert. denied, 469 U.S. 1122 (1985).

To be sure, relevancy is the touchstone of any discovery request. See Fed. R. Civ. P. 26(b); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2008, at 41 (1970) ("Perhaps the single most important word in Rule 26(b) is 'relevant' for it is only relevant matter that may be subject to discovery."). Yet this does not mean courts must ignore possible constitutional violations that would render the subpoena invalid.

Here, the district court did not rely on *Franklin & Marshall* when it barred the University from defending the subpoena enforcement action. Instead, it concluded that constitutional issues in general could not be considered, and denied the University's request for discovery on that issue. See J.A. at 144 (order of Sept. 1, 1987) (constitutional and APA defenses "are an improper response to an application to enforce an administrative subpoena.") We will affirm the district court's order, but on different grounds.

Even when a subpoena is authorized by statute and relevant to the agency's investigative mission, "different considerations come into play when a case ... implicates first amendment concerns. ... [P]rotection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny "

Federal Election Comm'n v. Larouche Campaign, 817 F.2d 233, 234 (2d Cir. 1987) (per curiam) (citing *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386-88 (D.C. Cir.), cert. denied, 454 U.S. 897 (1981)); cf. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (production order may be challenged as violation of first amendment); *Local 1814, Intern. Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 270, 271 (2d Cir. 1981) (government attempts to compel disclosure subject to exacting scrutiny in first amendment context). Indeed, the first amendment issue decided in *Franklin & Marshall* arose in the form of a defense to an agency's subpoena enforcement action. *Franklin & Marshall*, 775 F.2d at 111. Thus, when a nonfrivolous first amendment concern is raised, an agency "is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation." *Federal Election Comm'n v. LaRouche Campaign*, 817 F.2d at 234; accord *United States v. Citizens States Bank*, 812 F.2d 1091, 1093 (8th Cir. 1980).

As a matter of law, therefore, the University was entitled to assert the first amendment as a defense to the compelled production of private peer review materials. We need not remand, however, to the district court for consideration of the first amendment defense. Although the University characterizes its first amendment attack as a challenge to a national EEOC policy, its allegation raises essentially the same question decided in *Franklin & Marshall*. Under these circumstances, therefore, remand would serve no purpose. The district court, like this panel, lacks authority to overrule an opinion of a previous panel. See *Poultis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 867 (3d Cir. 1984) (quoting Internal Operating Procedures of the Court of Appeals for the Third Circuit, Chapter 8.C).

We must employ a different analysis, however, with respect to the University's claim that it should have been entitled to raise its APA claim as a defense to the subpoena enforcement action.⁸ Aside from contentions raising first amendment issues, see *supra*, or abuse of process concerns, see *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 125 (3d Cir. 1981) (en banc), the role of the court in a subpoena enforcement proceeding is "sharply limited." See *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987) (quoting *EEOC v. South Carolina Nat'l Bank*, 562 F.2d 329, 332 (4th Cir. 1977)).

Courts must refrain from allowing the subpoena enforcement proceeding to develop into a full-blown trial of the underlying claim. "If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay." *EEOC v. Tempel Steel Co.*, 814 F.2d at 485. As we observed earlier, delay at the EEOC's investigative stage contravenes the express intent of Congress. Nevertheless, courts are not required to enforce every agency subpoena. The subpoena must be issued pursuant to an investigation within the agency's authority, see e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54.

8. There is some question whether the University raised its APA defense before the district court. See Brief of EEOC as Appellee at 19. As we read the allegation, however, the EEOC does not contend that the APA issue was not properly presented for consideration by the Eastern District of Pennsylvania judge. Instead, it argues that the University informed the Eastern District of Pennsylvania judge that the APA and constitutional issues were pending only in the District of Columbia court.

Our reading of the record establishes that both issues were raised in the district court. Moreover, the order from the Eastern District of Pennsylvania judge indicates that the court perceived the APA and constitutional issues as having been properly raised.

82 (1984) (agency seeking subpoena enforcement must comply with "the strictures embodied in Title VII"⁹; it must be definite; and it must seek information relevant to the charge under investigation. *Id.* at 72 & n. 26; *United States v. Powell*, 379 U.S. 48, 57, 58 (1964); *Endicott Johnson Co. v. Perkins*, 317 U.S. 501, 509 (1943); *EEOC v. University of Pittsburgh*, 643 F.2d 983, 985 (3d Cir.), cert. denied, 454 U.S. 880 (1981).

The University raised none of these objections. Instead, it attempted to block the subpoena by alleging that the EEOC's refusal to modify its subpoena was governed by a national policy requiring full disclosure of academic peer review materials. Adoption of this policy, the University contends, constituted agency rulemaking in violation of the APA, 5 U.S.C. § 553(b). See generally *supra* note 1. We recognize, of course, that an agency rule that violates the APA may not be afforded the "force and effect of law." See *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). The EEOC, however, contends that it need not comply with APA rulemaking when issuing investigative subpoenas in individual cases. Under its view, the determination of how an agency conducts its investigation is exempt from the notice and comment requirement because it is an interpretative rule, a general statement of policy, or a rule of agency organization, procedure or practice. See 5 U.S.C. § 553(b)(3)(A).

The district court declined to address these APA issues at the subpoena enforcement stage. We find no error in this determination.

9. For example, in *EEOC v. Shell Oil Co.*, the Court observed that before the EEOC can insist that an employer obey a subpoena, the party alleging discrimination must file a valid charge, and the employer must receive timely notice of that charge. 466 U.S. at 65, 81-82 (1984). Otherwise, the Court noted, "Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted." *Id.* at 65.

Even if the University were permitted to raise its APA defense, and establish that the EEOC rule was invalid, the University has not established how the EEOC could be prevented from enforcing a particular subpoena. Pursuant to an express congressional grant of authority, the EEOC is empowered to subpoena records relating to a charge of discrimination. 42 U.S.C. § 2000e-8(a) (authority to inspect and copy evidence relevant to a charge under investigation); *id.* § 2000e-9 (authority to issue administrative subpoenas and seek judicial enforcement); see generally *EEOC v. Shell Oil Co.*, 466 U.S. at 63; *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 596 (1981); *EEOC v. University of Pittsburgh*, 643 F.2d 983, 986 (3d Cir.), cert. denied, 454 U.S. 880 (1981). Invalidity of an alleged EEOC subpoena "rule" in an enforcement proceeding would not overrule the EEOC's statutory grant of investigative subpoena power in individual cases. Thus, regardless of the APA, the EEOC maintains its ability to justify a subpoena in a particular case. See 42 U.S.C. §§ 2000e-8(a), 2000e-9. We agree with the district court that the EEOC has done so here. Indeed, our decision in *Franklin & Marshall* upheld enforcement of an EEOC subpoena under nearly identical circumstances. 775 F.2d at 112, 117. Moreover, in the context of a subpoena enforcement action, consideration of the type of APA defense asserted by the University would impede the EEOC's statutory mandate to promptly investigate whether a Title VII violation has occurred.

Although our jurisprudence clearly allows the University to raise constitutional and abuse of process defenses to a Title VII subpoena enforcement action, we hold that the University cannot assert an APA rule-making defense at this stage of these proceedings to defeat the EEOC's subpoena power. We expressly do not reach the question whether an APA defense can be

raised at a later stage in the proceedings. Accordingly, we will affirm the district court's order barring the University from raising its first amendment and APA claims as defenses to this subpoena enforcement action.

D. Redaction

Finally, the University contends that if the subpoena is enforced, the district court should have ordered the peer review records redacted to delete "names and identifying data" of professors other than the charging party. See *Franklin & Marshall*, 775 F.2d at 117. The EEOC, meanwhile, maintains that: (1) *Franklin & Marshall* did not mandate redacted records; (2) the University never offered to provide redacted records; and (3) redacted records would be useless.

In *Franklin & Marshall*, the district court's redaction order was entered with the EEOC's concurrence. Thus, we question the EEOC's claim that redacted records are useless. Although we realize that the University never offered to provide redacted records, we believe that given the present posture of this case, it should have the opportunity to formally raise this possibility before the trial court.

On this limited record, we believe the University has offered reasons that may justify redaction.¹⁰ Resolution of this issue, however, must be made by the district court on the basis of a full record. If the district court orders redaction, the parties should be able to agree on a proper form. Failing that, the district court can resolve any dispute in a manner that ensures the

10. For example, the University notes that the EEOC has not insisted on unredacted records in previous similar cases, and that the identity and affiliation of individuals who evaluate the tenure candidates are irrelevant to the EEOC's investigation of a discrimination charge.

redacted records are not so distorted by deletions that they are useless for EEOC investigative purposes. See generally *EEOC v. University of Notre Dame*, 715 F.2d at 338 (requiring redaction and outlining redaction procedures).

Thus, we will vacate that portion of the district court's order to the extent it required the release of nonredacted records, and remand for further consideration of the redaction issue.

For these reasons, we will affirm in part and vacate in part the district court's order. Each party shall bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1547

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

UNIVERSITY OF PENNSYLVANIA

The Trustees of the
University of Pennsylvania

Appellant

(D.C. Miscellaneous No. 87-0294)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA and COWEN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT

Circuit Judge

Dated: August 11, 1988

In The Matter Of:

ROSALIE TUNG,)	
Charging Party,)	
v.)	Charge No. 031-854082
UNIVERSITY OF PENNSYLVANIA,)	Subpoena No. EP-86-08
Respondent.)	

**Determination On Petition
To Modify Subpoena Duces Tecum**

Background

This Determination is in response to a "Petition to Modify Commission Subpoena No. EP-86-08" dated October 10, 1986. Subpoena No. 86-08 sought the following information which Respondent has refused to provide:

- (1) Those portions of Charging Party's tenure review file containing letters written by evaluators, by the Department Chairman, and the Department Evaluation Report summarizing the deliberations of the Management Department and certain members of that Department.
- (2) The complete tenure review files for Balaji Chakravarthy, Jehashua Eliasburg; David Smittlein, Harry Faulhaber, and Barton Weitz, male faculty members who were reviewed for and/or were awarded tenure.

The Subpoena in question was issued, on behalf of the Commission, by the Director (Acting) of the Philadelphia District Office. The Subpoena was issued in furtherance of the Commission's investigation of an alleged violation of Title VII of the Civil Rights Act of 1964. The Charging Party, a female, of Chinese national origin, was employed by Respondent, the University of

Pennsylvania, as an untenured Associate Professor in the Management Department of the Wharton School in 1981. Charging Party was reviewed for tenure during the 1984-1985 academic year. The Charging Party alleged in her charge of discrimination that she was denied tenure because of her sex, her race, and her national origin. She also alleged that she was sexually harassed by the Department Chairman.

The Petition to Modify requests that the Subpoena be modified to exclude the Commission's request for "confidential documents not previously supplied by the University, including letters of evaluation and documents reflecting the deliberations of the Management Department or its members and committees", with respect to the Charging Party and the five named faculty members for which the Commission requested such information. The petition also requests that the Commission "modify its approach in tenure review investigations to adopt a balancing approach reflecting the constitutional and societal interests inherent in the peer review process and that the Commission alter its policy to adopt all feasible matters to minimize the intrusive effects of its investigations. . . ."

Decision

The request to modify the subpoena is denied. The subpoenaed information from the Charging Party's tenure review file as well as that from the five named individual faculty members tenure review files is needed in order to make a determination on the allegations of employment discrimination made by Ms. Tung in her charge. The information is necessary in order to determine whether Ms. Tung was treated differently than those who received tenure. As such this portion of the subpoena cannot be modified as requested.

The Commission's position is fully supported by the applicable law in the Third Circuit, where this charge

arose. See *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (3rd Cir. 1985), 39 FEP Cases 211. In the *Franklin and Marshall College* case, the college raised virtually the same arguments which Respondent in this case raises in its petition regarding the dangers to the peer review process, and the invasion of constitutional rights which would result from the disclosure to the Commission of information and documents relating to the grant or denial of tenure. The Court there ordered the Respondent to turn over to the Commission documents and information (similar to that requested in Subpoena No. EP-86-08) regarding both the peer review process and tenure decisions respecting the Charging Party and other faculty members used as a comparative base. The Court found nothing in the legislative background of Title VII, nor any other policy reasons, to support and contention that tenure decisions should be treated any differently from any other employment decisions, notwithstanding principles of academic freedom. The Court there stated (*id.* at 115:

"We look further for evidence that Congress intended that special treatment be accorded academic institutions under investigation for discrimination and find none. No inference can be drawn from the legislative history of Title VII, as amended, that Congress intended or would permit academic institutions to bar the EEOC's access to material relevant to an investigation. A privilege or Second Circuit balancing approach which permits colleges and universities to avoid a thorough investigation would allow the institutions to hide evidence of discrimination behind a wall of secrecy."

There has not been enough data supplied in order for the Commission to determine whether there is reasonable cause to believe that the allegations of sex, race and national origin discrimination is true. The Commission is mandated by statute to investigate

charges of alleged discrimination. The Commission would fall short of its obligation if it stopped its investigation once a Respondent has [supplied a statement that] provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination.

The Commission understands the importance which is attached to the peer review process in the grant of tenure to academic faculty at our institutions of higher learning. It should be noted that Title VII contains, in Section 709(e), a confidentiality provision which provides protection against making public evidence obtained by the Commission in the investigation of a Title VII charge of discrimination. Officers and employees of the Commission are prohibited from making such information public, and are subject to a fine or imprisonment for a violation. We note that, while the Commission declines to follow the balancing test advocated by the Seventh Circuit in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (1983), the Respondent in that case agreed to turn over the requested information after redacting from the files names and identifying information or features concerning academicians who participated in the peer review process. Such information was redacted from evaluations and reports found in the files, and the files were turned over to the EEOC. Respondent in this case objects to providing any information from the Charging Party's file or the files of the five named individuals respecting evaluations, reports and deliberations involved in the tenure review of these persons.

The balancing test which Respondent urges the Commission to adopt would require the Commission to determine whether its need for disclosure of the tenure review information and documents outweighs any adverse effect such disclosure would have on policies underlying any recognized qualified academic freedom privilege. See, *Gray v. Board of Higher Education, City*

of New York, 692 F.2d 901 (2nd Cir. 1982). Aside from the fact that a Petition to modify a subpoena is an inappropriate vehicle in which to request that the Commission adopt a generalized policy with respect to tenure denial cases, the Commission rejects such an approach in the instant case as it would impair the Commission's ability to fully investigate this charge of discrimination, and the information is relevant and necessary to a determination on the charge involved.

For the reasons given above, your petition to modify the subpoena in the instant case is denied. The Respondent is requested to respond to the Subpoena within twenty days of the date of receipt of this letter to avoid enforcement proceedings.

On Behalf of the Commission

Executive Officer
Executive Secretariat

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)
Applicant,)
v.) Misc. No. 87-0294
) Judge John B. Hannum
UNIVERSITY OF PENNSYLVANIA,)
Respondent.)

ORDER

AND NOW, after examining the case law in light of the Respondent's discovery request and the Petitioner's Opposition thereto, it is determined that the Respondent's asserted defenses to wit it requests discovery are an improper response to an application to enforce an administrative subpoena. Therefore its discovery requests must be denied.

It is hereby ORDERED AND DECREED on this 1st day of September, 1987 that the EEOC does not have to respond to the Respondent's discovery request because the Respondent's request to conduct such discovery is denied.

By the Court:

United States District Judge

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT :
OPPORTUNITY COMMISSION :
v. : MISC. NO. 87-0294
UNIVERSITY OF PENNSYLVANIA :

ORDER

AND NOW, this 1st day of September, 1987, upon consideration of the Order to show cause filed by the Equal Employment Opportunity Commission (EEOC) (Docket Entry No. 1), the motion to dismiss filed by the University (Docket Entry No. 2), the EEOC's response to the motion to dismiss (Docket Entry No. 3), the arguments of counsel in open court on July 2, 1987, the University's reply memorandum in support of the motion to dismiss (Docket Entry No. 5), the EEOC's opposition to the University's discovery request (Docket Entry No. 7), the memorandum of the University in support of its discovery requests (Docket Entry No. 8), and this Court's Order dated September 1, 1987, denying the University's discovery requests, it is hereby ORDERED that the University will comply with the subpoena duces tecum issued by the EEOC and will produce the information that is requested in the subpoena within ten (10) days from the entry of this Order. It is further ORDERED that the Motion to dismiss is DENIED as moot.

**EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, Appellee,**

v.

**FRANKLIN AND MARSHALL
COLLEGE, Appellant.**

No. 84-1739.

United States Court of Appeals,
Third Circuit.

Argued Aug. 5, 1985.

Decided Oct. 21, 1985.

Rehearing and Rehearing En Banc
Denied Nov. 29, 1985.

Equal Employment Opportunity Commission brought action against college seeking compliance with subpoena duces tecum compelling disclosure of confidential peer review material pursuant to investigation of assistant professor's charge that he was denied tenure because of his French national origin. The United States District Court for the Eastern District of Pennsylvania, Joseph S. Lord, III, Esq., entered order enforcing the subpoena, and college appealed. The Court of Appeals, Mansmann, Circuit Judge, held that: (1) qualified academic privilege would not be recognized and balancing approach would not be adopted, and (2) Commission's requests were relevant and not overbroad.

Affirmed.

Aldisert, Chief Judge, filed dissenting opinion.

Adams, Circuit Judge, filing dissenting statement on denial of rehearing.

1. Administrative Law and Procedure 385

Court would recognize neither qualified academic privilege nor balancing approach in determining whether to enforce subpoena duces tecum issued by the

Equal Employment Opportunity Commission compelling college to disclose confidential peer review material. Civil Rights Act of 1964, §§701-718, as amended, 42 U.S.C.A. §§2000e to 2000e-17.

2. Civil Rights 34

Equal Employment Opportunity Commission would not be required to make initial showing of some merit to employment discrimination charge in order to obtain enforcement of subpoena duces tecum issued to college seeking disclosure of confidential peer review material. Civil Rights Act of 1964, §§701-718, as amended, 42 U.S.C.A. §§2000e to 2000e-17.

3. Civil Rights 34

Relevant standard limiting Equal Employment Opportunity Commission's subpoena power does not limit that power to that which might be relevant at trial; rather, the Commission is entitled to all that is relevant to the charge under investigation. Civil Rights Act of 1964, §709(a), as amended, 42 U.S.C.A. §2000e-8(a).

4. Civil Rights 34

Concept of relevancy which limits Equal Employment Opportunity Commission's subpoena power is construed broadly when a charge is in investigatory stage. Civil Rights Act of 1964, §§701-718, as amended, 42 U.S.C.A. §§2000e to 2000e-17.

5. Civil Rights 34

It is neither for the Equal Employment Opportunity Commission nor for courts to reevaluate a candidate's qualifications in an employment discrimination action brought against a college or university; scope of Commission's role is to determine whether there is evidence to support charge that employment decision was based

upon reasons protected by federal statute. Civil Rights Act of 1964, §§701-718, as amended, 42 U.S.C.A. §§2000e to 2000e-17.

6. Civil Rights 34

Equal Employment Opportunity Commission subpoena duces tecum compelling college to disclose confidential peer review material would be enforced because material sought was relevant to investigation of assistant professor's claim that he was denied tenure because of his French national origin. Civil Rights Act of 1964, §§701-718, as amended, 42 U.S.C.A. §§2000e to 2000e-17.

Johnny J. Butler, Acting General Counsel, Vella M. Fink, Asst. General Counsel, Colleen M. O'Connor (argued), J. Kenneth L. Morse, Attys., E.E.O.C., Washington, D.C., for appellee.

George C. Werner, Jr. (argued), Barley, Snyder, Cooper & Barber, Lancaster, Pa., for appellant.

Rod J. Pera, Mary Jane Forbes, J. Thomas Menaker, McNees, Wallace & Nurick, Harrisburg, Pa., for amici curiae.

Before ALDISERT, Chief Judge, and STAPLETON and MANSMANN, Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This court must decide whether the district court erred in requiring Franklin and Marshall College ("College") to comply with a subpoena duces tecum issued by the Equal Employment Opportunity Commission ("EEOC") which compels disclosure of confidential peer review material. The College and the *amici curiae* urge adoption of a qualified academic peer review privilege which, if properly applied to the facts at issue, would

protect, they argue, the confidential material from the agency's subpoena. After careful consideration of all matters raised by brief and in oral arguments, we decline to adopt the proffered qualified academic peer review privilege. Because we find that the material sought by the EEOC is relevant to its investigation, the order compelling compliance with the subpoena will be affirmed.

I.

This subpoena enforcement action arises out of the EEOC's investigation of a charge of discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2000e-17, filed by Gerard Montbertrand, a former assistant professor who was denied tenure, against the College. Professor Montbertrand was hired on July 1, 1977 as a member of the College's French Department. He was assigned primarily upper level French courses, although the College asserts that, due to the Department's limited size (4 professors), he was expected to be able to teach lower level French language courses. In the Fall of 1980, Professor Montbertrand was reviewed for tenure by the Professional Standards Committee. The committee is composed of the Dean of the College and five faculty-elected members. It performs all tenure reviews at the College. The Chairperson of the French and Italian Departments did inform the committee of evaluations recommending Professor Montbertrand for tenure. The Professional Standards Committee, however, recommended against awarding tenure to Montbertrand. That recommendation was accepted by the Dean and by the President of the College.

After Professor Montbertrand was informed of the denial of his tenure, he requested a written statement of the reasons. In a letter from the President of the College dated January 21, 1981, Montbertrand was informed

that the minutes of the Professional Standards Committee stated that "[t]enure was not recommended because deficiencies in the areas of scholarship and general contributions were not sufficiently offset by performance in other areas." Appendix, at 101a.

Professor Montbertrand requested reconsideration of the tenure decision. The Professional Standards Committee reconsidered its decision in light of additional information submitted by Montbertrand and by others. The committee reaffirmed its earlier recommendation to deny tenure. That recommendation was again accepted by the Dean and by the President of the College.

Professor Montbertrand petitioned the College's Grievance Committee for review of the tenure decision, alleging denial of academic freedom and academic due process. After reviewing the allegations and finding no merit in the claims, the Grievance Committee dismissed the petition in May of 1981.

In June of 1981, Professor Montbertrand filed a charge of discrimination with the EEOC alleging discrimination based on his French national origin. In the course of its investigation, the EEOC issued the subpoena duces tecum which is the subject of this action. The subpoena required that the College:

1. For each individual *granted* or *denied* tenure during the period November 7, 1977 to the present, provide the following records or documents:
 - a) Tenure Recommendation forms,
 - b) COTE form results [analyzing student evaluations],
 - c) Grade surveys,
 - d) Enrollment data,
 - e) Annual evaluation forms, including third year review,
 - f) Governance evaluation forms,

- g) Publication information and evaluations by outside experts,
- h) Letters of reference,
- i) Information regarding academic advising,
- j) All ^{as} notes, letters, memoranda or other documents considered during each tenure case, including curricula vitae,
- k) Recommendations of Professional Standards Committee in each tenure case, and
- l) Actions taken by the President in each tenure case.

2. Produce and make available for inspection all notes, letters, memoranda or other documents generated by each Professional Standards Committee member, as part of his/her involvement in Charging Party's original tenure case and subsequent reconsideration.
3. Produce and make available for inspection the minutes of each Professional Standards Committee meeting in which each tenure case, during the period November 1977 to the present, was discussed.

Appendix, at 32a-33a. The EEOC offered to accept the material with names and identifying characteristics deleted. *Id.* at 129a.

Prior to the issuance of the subpoena, the College had permitted the EEOC to review, but not copy, the minutes of all Professional Standards Committee meetings regarding the Montbertrand decision. In response to the subpoena, the College agreed to provide the EEOC with data regarding the performance of each tenure candidate considered from 1977 to the date of the subpoena as well as the disposition of each case and the statement of reasons from the Professional Standards Committee (subpoena requests 1(k) & 1(l)). The College also offered to comply with the portions of the subpoena

seeking documents not considered confidential peer review material such as COTE scores, grade surveys and enrollment data (subpoena requests 1(b), 1(c) & 1(d)).

At issue before us now is the College's refusal to provide the bulk of the material sought, including tenure recommendation forms prepared by faculty members, annual evaluations (except those prepared by the Dean), letters of reference, evaluations of publications by outside experts, and all notes, letters, memoranda or other documents considered during each tenure decision (subpoena requests 1(a), 1(e), 1(g), 1(h), 1(j), 2 & 3).¹

When the EEOC pressed for full compliance with the subpoena, the College pursued administrative relief by filing with the agency a Petition to Revoke or Modify the Subpoena. After the EEOC denied the petition on August 18, 1983, the College appealed to the EEOC to alter its decision. The EEOC denied that appeal on June 29, 1984. The College informed the EEOC on July 26, 1984 that it would not fully comply with the subpoena.

The EEOC then initiated the instant litigation by filing an Application for Order to Show Cause Why a Subpoena Should Not Be Enforced in the district court. On November 9, 1984, the court filed an Order compelling the College to comply with subpoena requests 1(e), 1(h), 1(j), 2 and 3 but, with the EEOC's concurrence, allowing the College to omit names and identifying data.

The College subsequently filed this appeal and moved the district court for a stay pending appeal. On December 28, 1984, the district court filed an order staying enforcement of its order compelling compliance with the subpoena pending disposition of the appeal. We granted Gettysburg College and Dickinson College leave to file an *amici curiae* brief. We also permitted Allegheny College, Bucknell University, Chatham College,

1. The College apparently does not possess governance evaluation forms and information regarding academic advising (subpoena requests 1(f) & 1(i)). See Appendix, at 62a.

Haverford College, Lafayette College and Lehigh University to participate as *amici curiae* and to adopt the *amici curiae* brief previously filed.

II.

On appeal, the appellant and the *amici curiae* urge this court to reverse the district court's order compelling the College's compliance with the subpoena duces tecum issued by the appellee. The appellant contends that "the quality of a college, and in a broader sense, academic freedom, which has a constitutional dimension, is inextricably intertwined with a confidential peer review process." Brief of Appellant, at 116. For this reason, the appellant argues, "disclosure of peer review material should be compelled only when facts and circumstances give rise to a sufficient inference that some impermissible consideration played a role in the tenure decision." *Id.* at 116. The appellant suggests that the court should adopt a qualified academic peer review privilege which would prevent disclosure of confidential peer review material absent a showing of an inference of discrimination. Adoption of such a privilege, argues the appellant, strikes the proper balance between the needs of the EEOC in its investigation and the College's interest in maintaining academic freedom.

The appellant and the *amici curiae* are not the first to advocate the privilege. Several United States Courts of Appeals have addressed the issue and have reached differing results. The United States Court of Appeals for the Seventh Circuit has recognized a qualified privilege requiring particularized need before ordering disclosure of the names and identities of persons responsible for material generated in the peer review tenure process. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337-38 (7th Cir. 1983). The Court of Appeals noted the unusual posture of the case, stating that "[t]his case is unique in that Notre Dame is voluntarily producing

redacted files to the EEOC." *Id.* at 337 n. 4. The court did suggest that in a case where disclosure of the confidential material was in controversy, "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.*

The United States Court of Appeals for the Second Circuit adopted a balancing approach, but not a rule of privilege, in a discrimination action brought under 42 U.S.C. §§1981, 1983 & 1985. *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 904-05 (2d Cir. 1982). The Court of Appeals applied its balancing test and decided, on the particular facts of the case, to reverse the district court's order denying the plaintiffs' motion to compel discovery of the votes of two members of the tenure committee. While the case did not involve a subpoena issued by the EEOC pursuant to Title VII, the analysis of the *Gray* court may be helpful nonetheless in the context of a Title VII investigation. *Cf. EEOC v. University of Notre Dame Du Lac*, 715 F.2d at 337 & n. 3.

Unlike the Seventh and Second Circuits, the United States Court of Appeals for the Fifth Circuit expressly rejected a proposed privilege based on academic freedom. *In re Dinnan*, 661 F.2d 426, 427 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2904, 73 L.Ed.2d 1314 (1982). The *Dinnan* court held that a member of the College Education Promotion Review Committee could not refuse to reveal his vote on the application for promotion in question. *Id.*

[1] We decline to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach. It is true that the concept of "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438

U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978) (Powell, J., announcing Court's judgment and expressing his views of case). "[T]he four essential freedoms' of a university" have been said to include the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in result) (citation omitted). Central to the determination of "who may teach," or who will receive tenure, has been the system of peer review by confidential evaluations and recommendations of tenured faculty. "[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1346 (W.D.Pa.1977) (citation omitted) (quoted in *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir.1980)).

We recognize that confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review and, thus, has been essential to the determination of "who may teach," especially in such close educational settings of the size of appellant where tenure applicants and tenure decision-makers continue to work side-by-side. Appellant and *amici curiae* have forcefully argued the increased importance of confidentiality based upon the relatively small size of the teaching staffs and administrative personnel. They cite embarrassment, confrontational situations and the fear of less than honest evaluations as likely results of a lack of confidentiality.

In assessing the importance of the academic freedom principles at issue, our starting point is an examination of Congress' intent in enacting and amending Title VII legislation. We begin with Congress' manifest refusal to exempt academic institutions from Title VII's

prohibition against discrimination. As the Supreme Court of the United States has reminded us, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974) (citation omitted). Congress clearly intended that this goal be no less important in the academic setting than in industry. In 1972, Congress deleted the exemption for institutions of higher education which was contained in the original legislation. As this court has stated previously, "[t]he legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements." *Kunda*, 621 F.2d at 550. The House Report from the Education and Labor Committee, reporting on several proposed amendments including the elimination of the immunity under Title VII previously extended to academic institutions, states:

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. . . . The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fu[t]ure development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

H.R.Rep. No. 92-238, 92nd Cong., 2nd Sess. 19-20, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2155. In *Kunda v. Muhlenberg College*, this court concluded from the legislative history of Title VII and its amendments that, notwithstanding principles of academic freedom, tenure decisions fall within the intended

scope of the Act. 621 F.2d 532, 547-48 (3d Cir.1980). "Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions." *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir.1979).

We look further for evidence that Congress intended that special treatment be accorded academic institutions *under investigation* for discrimination and find none. No inference can be drawn from the legislative history of Title VII, as amended, that Congress intended or would permit academic institutions to bar the EEOC's access to material relevant to an investigation. A privilege or Second Circuit balancing approach which permits colleges and universities to avoid a thorough investigation would allow the institutions to hide evidence of discrimination behind a wall of secrecy.

We are not unmindful of nor insensitive to the importance of confidentiality in the peer review process, especially for institutions of the size and character of the appellant college and the *amici curiae*. We recognize that permitting disclosure to the EEOC of confidential peer review material may perhaps burden the tenure review process in our nation's universities and colleges. In the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, however, we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality.

III.

Appellant and *amici* urge an interpretation of the discovery rules which would require an initial showing by the EEOC of some merit to the discrimination charge before disclosure of confidential material could be ordered. In this regard, appellant argues that, despite the

preliminary stage of this matter (i.e., prior to any litigation having been filed), the EEOC should be held to a higher discovery standard than parties would be once litigation has commenced. Further, appellant implicitly argues that discovery should be limited to the pretext issue and that any evidence that its legitimate reason for tenure denial is pretext (though denied) can be drawn from the non-confidential material and summary charts which the College is willing to release to the EEOC.

[2, 3] We reject this concept because it is inconsistent with the language, history and purpose of Title VII and with Congress' grant of investigatory authority to the EEOC. Congress has made clear that the scope of the EEOC's subpoena power is limited by the standard of relevance. See 42 U.S.C. §2000e-8(a). The EEOC is not limited, as the appellant appears to suggest, to that which might be relevant at trial. Rather, the EEOC is entitled to all that is relevant to the charge under investigation. *EEOC v. Shell Oil Co.*, 466 U.S. 54, ___, 104 S.Ct. 1621, 1628, 80 L.Ed.2d 41 (1984). In *EEOC v. Shell Oil Co.*, the Supreme Court of the United States rejected the proposition that a district court must find the charge of discrimination to be well-founded, verifiable, or based on reasonable suspicion before enforcing an EEOC subpoena. *EEOC v. Shell Oil Co.*, 466 U.S. at ___ n. 26 & ___ n.33, 104 S.Ct. at 1632 n. 26 & 1635 n. 33. The Court explained:

The district court has a responsibility to satisfy itself that the charge is valid and that the material requested is "relevant" to the charge [citation omitted] and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose. [citations omitted] However, any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error.

Id. at ___ n. 26, 104 S.Ct. at 1632 n. 26.

[4] The concept of relevancy is construed broadly when a charge is in the investigatory stage. *EEOC v. University of Pittsburgh*, 643 F.2d 983, 986 (3d Cir.), cert. denied, 454 U.S. 880, 102 S.Ct. 362, 70 L.Ed.2d 190 (1981). The Supreme Court of the United States, in discussing the application of the relevance standard to a Title VII subpoena, noted Congress' apparent endorsement of an interpretation of the relevance standard which affords the EEOC access "to virtually any material that might cast light on the allegations against the employer."

Since the enactment of Title VII, courts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer. In 1972, Congress undoubtedly was aware of the manner in which the courts were construing the concept of "relevance" and implicitly endorsed it by leaving intact the statutory definition of the Commission's investigative authority. On the other hand, Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.

EEOC v. Shell Oil Co., 466 U.S. at ___, 104 S.Ct. at 1630.

Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorandum which the appellant seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that

some pattern of discrimination appears. Accord *Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1240-41 (7th Cir.1985) (comparative evidence may be appropriate to rebut employer's proffered, non-discriminatory explanation). Relative qualifications of those who teach in academic institutions are not amenable to objective comparison in charts. Instead, the peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.²

[5] We hasten to add in this regard that it is neither for the EEOC nor for the courts to reevaluate a candidate's qualifications. *Kunda*, 621 F.2d at 547-48 (cited with approval in *Hishon v. King & Spalding*, ___ U.S. ___, n. 4, 104 S.Ct. 2229, 2233 n. 4, 81 L.Ed.2d 59 (1984) (Powell, J., concurring)). The scope of the EEOC's role is to determine whether or not there is evidence to support a charge that an employment decision was based upon reasons protected by federal statute. The oft times difficult decision to promote or to grant tenure shall be left exclusively to this nation's

2. Tenure decisions are not entitled to special treatment in Title VII actions merely because they are founded in part on subjective criteria, including the level of esteem in which a candidate is held by his colleagues and peers. Similar criteria must be considered in a Title VII review of any employment decision.

The subjective esteem of colleagues and supervisors is often the key to any employment decision. Yet, especially in the blue-collar context, the courts have not hesitated to review with great suspicion subjective judgments that adversely affect minorities. . . . Indeed, subjective esteem is more important in certain blue-collar contexts, where, for example, lives may depend on the employee's performance and good judgment. . . . And because all lawyers and judges are trained in academia, courts are better equipped to scrutinize academic decisionmaking than decisionmaking in the perhaps less familiar blue-collar context.

Namenwirth, 769 F.2d at 1244-45 (Swygert, J., dissenting) (citations omitted).

colleges and universities so long as the decisions are not made, in part large or small, upon statutorily impermissible reasons.

IV.

[6] After careful review of the EEOC's subpoena requests with the appropriate relevance standard in mind, we find the EEOC's requests are relevant and not overbroad. The material pertaining to the Montbertrand tenure decision is clearly relevant to the investigation. The EEOC also asks for material on persons other than Montbertrand who were considered for tenure from November 7, 1977 to the date of the subpoena. Since Montbertrand was hired in 1977 and considered for tenure in 1980, the data requested on other candidates is part of an appropriate comparative base. We note parenthetically that the district court ordered, with the EEOC's concurrence, that names and identifying data of the other professors would be omitted.

Consequently, since we find that the material sought in the subpoena duces tecum at issue is relevant to the EEOC's investigation, the district court's order will be affirmed.

ALDISERT, Chief Judge, dissenting.

What divides this panel is a philosophical difference in two separate, but in this case, related, broad concepts: the extent to which an EEOC administrative subpoena may cast an immense discovery net that compromises privacy expectations of innocent third parties without the EEOC being put to the most meager burden of asserting a factual justificatory predicate for its actions; and the extent, if any, to which an employment discrimination claim based on professional tenure denial in a four person Department of French in a small liberal arts college differs from a discrimination claim against a multinational corporation such as Shell Oil Company.

The majority believe that there is absolutely no difference between what may be obtained by an EEOC administrative subpoena when a claim for lifetime tenure and position is implicated in the context of a small liberal arts college or when made in the context of a typical commercial employer. Notwithstanding the wealth of materials already furnished the EEOC by the college relating to Montbertrand's application for tenure, the majority would not place any burden whatsoever on the EEOC to show that it cannot intelligently evaluate the claim until it is in possession of case histories of every tenured position implicating confidential communications of innocent third parties. I reject both approaches because I abhor dogmatic application of the law. I reject slot machine justice, what Roscoe Pound called "Mechanical Jurisprudence,"¹ because it has been my experience that in many cases everybody may be a bit right, that nobody is completely right or completely wrong, and that each case has its own pathology. Thus, automatic and unbridled EEOC subpoena searches cannot be the law; and if it is, I am reminded of Chamfort's aphorism: "It is easier to make certain things legal than to make them legitimate."

The claimant contends that he was discriminated against because he was a French native. The EEOC has been given virtually everything contained in claimant's personnel files. It seems to me that the administrative subpoena should not be enforced in its entirety unless the EEOC demonstrates compelling necessity for rooting through confidential files of other faculty members. Certainly, the doctrine of *res inter alios acta* is alive and kicking today, and I believe that before a federal agency should be allowed to poke through the confidential files of strangers to an employer's discrimination claim, it should be held to some justificatory burden before a

federal judge, rather than being anointed with a ukase to fish in any waters selected by it, and it alone.

We have federal courts to draw the line against arbitrary and capricious federal agency actions and this case cries out for preliminary judicial adjudication, instead of agency action gone wild. The facts presented here require that a district court exercise a highly refined discretion and be particularly sensitive to the valid interest of confidentiality in the tenure review process before ordering wholesale production of confidential documents of strangers to this proceeding at this very preliminary stage of an investigation. Because neither the district court nor the majority accord this sensitivity, I dissent. I would reverse the judgment of the district court.

I.

Several facts underlying this appeal are critical. Appellant Franklin and Marshall is a small liberal arts college with a student enrollment of 1,900. Montbertrand sought a tenured position in a French Department that consists of four persons. As is the norm in institutions of higher education, the decisional process in awarding tenure involves not only the college administrative staff, but faculty as well. Initial tenure decisions are made by the Professional Standards Committee, all five members of which are elected by the faculty. This committee makes tenure recommendations to the Dean and President of the College. In Montbertrand's case, the committee—comprised of faculty members only—recommended that Montbertrand be denied tenure because of his deficiencies in scholarship and in participation in college governance activities. The College administration adopted this recommendation and the administrative and judicial proceedings leading to this appeal followed.

1. Pound, *Mechanical Jurisprudence*, 8 Colum.L. Rev. 605 (1908).

The majority assert that the College has refused to produce "the bulk of the material sought" by the EEOC. Maj. op. typescript at 112. This characterization is not fair. The College has provided or agreed to provide a considerable amount of data.² I believe the district court

2. This material includes:

1. Materials from Montbertrand's tenure file including:
 - (a) Third and Second Year Reviews;
 - (b) Letters to Montbertrand on the status of his tenure review; and
 - (c) Documents of Montbertrand supporting his tenure application;
2. Compilation by the College of the national origin of tenure candidates from 1977 to 1981;
3. Untitled list of faculty members, country of birth, present citizenship, and citizenship at birth;
4. Evaluations of Montbertrand's writings from four outside professors identified by name and college or university;
5. Faculty merit evaluation forms for Montbertrand;
6. Correspondence relative to Montbertrand's tenure denial;
7. January 21, 1981, letter from College President to Montbertrand discussing the fact that deficiencies in scholarship and general contributions were not offset by governance performance in other areas;
8. Handbook of College;
9. Faculty Handbook 1978;
10. Inter-office Memo from Chairman of French and Italian Departments, Angela Jeannet, to Professional Standards Committee, January 1980, regarding Third Year review of Montbertrand. The Memo provides information on work performance, publications, grants, professional activities, participation in college and department activities, and evaluation recommending Montbertrand for tenure with attached reappointment of probationary faculty.
11. COTE form results (Student Evaluations of Teaching Effectiveness);
12. Grade surveys;
13. Enrollment data;
14. Recommendations of Professional Standards Committee in each tenure case; and
15. Actions taken by the President in each tenure case.

should have analyzed this data carefully and on the basis of such analysis, required the EEOC to show that it had established a sufficient factual and legal basis to warrant the serious intrusion into the College's tenure review process in other cases. At a very minimum, the district court should satisfy itself of the necessity to breach the wall of confidentiality obviously present on this small campus.

II.

Colleges and universities occupy a unique position in our society. They are not commercial employers; they are not government agencies. Perhaps more than any other institution, they embody and promote under the rubric of academic freedom our cherished values of free inquiry and robust debate on a variety of subjects. As the majority correctly observe, academic freedom has constitutional underpinnings. "[T]hough not a specifically enumerated constitutional right, [academic freedom] long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978) (Powell, J., plurality opinion). The majority further note that "central to the determination of 'who may teach,' or who will receive tenure, has been the system of peer review by confidential evaluations and recommendations of tenured faculty." Maj. op. typescript at 114. Recognizing these crucial factors, the majority then analyze the legislative history of Title VII and conclude that this history somehow eradicates the importance of confidentiality in peer evaluations when the EEOC subpoenas documents generated in the tenure review process. The majority's analysis and application of legislative history to support the wholesale disclosure of all confidential materials simply proves too much.

The cited legislative history convincingly demonstrates that Congress intended Title VII to apply to universities and colleges. No one can argue to the contrary. The majority nonetheless rest their *ratio decidendi* entirely upon an analysis of the 1972 amendment to Title VII that eliminated the exemption for academic institutions. We are thus treated to a classic fallacy of irrelevance, or *ignoratio elenchi*. The error is made by attempting to prove something that has not been denied, to-wit that the 1972 amendment to Title VII took in institutions of higher learning. The question under consideration, however, is not whether Title VII was so amended but whether, on the strength of a mere conclusory allegation of discrimination, the EEOC is permitted the kind of intrusion into the tenure review process it seeks here. I find no support in the legislative history for the proposition that Congress foresaw the possibility, much less intended, that a college instructor may, with a blunderbuss allegation of discriminatory treatment against Frenchmen, devoid of factual specificity, gain unfettered access to the confidential personnel files of all his colleagues. The troublesome and recurring problem of statutory voids was recognized many decades ago by John Chipman Gray:

The fact is that the difficulties of so-called interpretation arise when the legislation has no meaning at all; when the question which is raised in the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.³

At bottom always is the task of divining the intention of the legislature. Learned Hand has observed:

3. J.C. Gray, *Nature and Sources of Law* 172-73 (2d ed. 1921).

When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. . . . Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves.⁴

Such an approach requires us to decide if Congress in fact intended a massive, uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process of innocent third parties. I do not think so. I believe that the congressional intent to eliminate employment discrimination can be fully served without conferring on the EEOC such absolute and unyielding investigatory powers to embark upon a fishing expedition into confidential materials. Discovery expeditions into records of commerce and industry implicate only money and time; they do not implicate confidential evaluations of professional performance uttered by intimate peers with the expectation of privacy.

III.

I do not agree with the majority's assumption that academic institutions are the same as any other employer. At least insofar as their administrative and governance structures are concerned, colleges and universities differ significantly from garden variety private employers.⁵ In the context of application of the provi-

4. L. Hand, *The Spirit of Liberty* 100, 109-110 (2d ed. 1954).

5. [A]uthority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. . . . This system of "shared authority" evolved from the medieval model of collegial decision-making in which guilds of scholars were responsible only to themselves. . . . At early universities, the faculty were the

sions of the National Labor Relations Act the Supreme Court has counseled that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444, U.S. 672, 681, 100 S.Ct. 856, 861, 63 L.Ed.2d 115 (1980) (citation omitted). The unique characteristics of the tenure review process led the court in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir.1983), to recognize a qualified academic review privilege. In *Notre Dame*, the court stated:

It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications. See *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328 (W.D.Pa. 1977). Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process. The tenure review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration. For these reasons, academicians who are selected to

NOTES (Continued)

school. Although faculties have been subject to external control in the United States since colonial times, . . . traditions of collegiality continue to play a significant role at many universities. . . .

NLRB v. Yeshiva University, 444 U.S. 672, 680, 100 S.Ct. 856, 861, 63 L.Ed.2d 115 (1979).

evaluate their peers for tenure have, since the inception of the academic tenure concept, been assured that their critiques and discussions will remain confidential. Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future.

Id. at 336.

IV.

In a subpoena enforcement proceeding the court should abjure rote application of dogma against a small college. Rather it should engage in a balancing analysis that will accord sufficient weight to the valid and competing interests at issue. The court must avoid slavish allegiance to conceptual jurisprudence, the now-discredited *Begriffsjurisprudenz*, the target of our great masters, Holmes, Pound, and Cardozo; rather, the court should always consider the decision's consequence upon the social order. The judiciary has an obligation to accommodate, whenever possible, competing interests without adopting a "zero sum" decisional structure that permits the reckless advancement of one interest irrespective of destruction wreaked upon other salutary competing interests. Yet the majority refuse to undertake this balancing analysis, opting instead to assert that somehow the legislative history of Title VII compels intrusion into the peers review system in every tenure decision made by the institution. At this time, it is not necessary for me to reach the question whether there is an academic review privilege, see *EEOC v. University of Notre Dame Du lac*, 715 F.2d 331 (7th Cir.1983). In this case, I am completely comfortable with the approach adopted in *Gray v. Board of Higher Education*, 692 F.2d 901, 903 (2d Cir.1982), in a discovery context:

Any finding that information is protected from discovery must reflect a balancing between, on the one hand, the parties' right to discovery, which stems

from society's interest in a full and fair adjudication of the issues involved in litigation and, on the other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value.

Extended logically, the majority's absolutist approach elevates the ethereal factor of relevancy as the only restraint on the EEOC subpoena process. At the administrative subpoena level there is absolutely no limitation to what is or is not relevant. There is no complaint filed in the district court, no factual averments of "a short and plain statement of the claim," as required by Rule 8, Federal Rules of Civil Procedure, no stated boundaries to the allegation of discrimination. To accept the majority's formulation is to indulge in a classic Catch-22: "In discovery we have the right to examine anything that is relevant, but we can't tell what is relevant until we finish our discovery." Because of the danger of harm created by the rupture of confidentiality, we cannot lend jurisprudential dignity to Tweedledee's soliloquy: "If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic."⁶

V.

I now turn to the various subpoena requests. I agree that Montbertrand's tenure review files should be produced with the names and other identifying criteria redacted. But records and documents pertaining to other faculty members, who were granted or denied tenure since November 7, 1977, implicate compelling confidentiality interests of strangers to these proceedings. Requests for these materials must first be evaluated by the district court in light of the considerable data already provided to the EEOC by Franklin and Marshall and by

6. L. Carroll, *Through the Looking Glass*, Chap. 4.

the data contained in Montbertrand's tenure file. Unless these documents disclose some modicum of substance to Montbertrand's claim of national origin discrimination, and some indication that these additional materials will prove the claim, we should not permit the serious violation of other faculty members' confidentiality that production of records will entail. Because the district court did not engage in this analysis, I would remand for appropriate findings.

To be sure, the EEOC is not required to establish a *prima facie* case in behalf of Montbertrand as a prerequisite to compelled production of documents. The majority properly cite *EEOC v. Shell Oil Co.*, 446 U.S. 54, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984), for the proposition that in a subpoena enforcement proceeding the EEOC need not establish that the charge is "well founded, verifiable, or based on reasonable suspicion." But the question here is not the *quality* of the factual predicate underlying the claim, but it is whether *any* factual predicate whatsoever is present to merit the assault on the confidential files of innocent strangers to this proceeding.

What I propose, congruent with the Second Circuit's approach in *Gray*, is a flexible, case by case approach that puts a modest burden on the EEOC whenever its request impinges upon "the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value." *Gray*, 692 F.2d at 903. At a minimum, based on materials already discussed such as in this case, the EEOC should be required to set forth a justificatory factual predicate for the confidentiality or privacy intrusions instead of naked conclusory allegations. Where, as here, confidentiality expectations of strangers are implicated, the subpoena should not, without court approval, be used as a tool in search of that predicate at the expense of privacy rights of innocent parties and of the integrity of the tenure review process.

**STATEMENT SUR DENIAL OF
PETITION FOR REHEARING**

ADAMS, Acting Chief Judge.

I would grant rehearing in banc because of the significant First Amendment implications this case holds for our colleges and universities as well as the division among the circuit courts of appeals. Federal court review of university decisions carries serious consequences for academic freedom. *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985) (Adams, J., dissenting). The tenure decision at issue here reduces in essence to the faculty's determination of who may teach, one of what Justice Frankfurter referred to as "the four essential freedoms of a university." *Sweezy*, 354 U.S. at 263, 77 S.Ct. at 1218. Yet the discovery order upheld by the panel allows for a broad sweep of files revealing the internal debate over tenure votes, without any demonstration of special need. In recognition of the threat this may pose to unrestrained discussion within the academic community, two other circuit courts of appeals have fashioned contrasting approaches to that adopted by the panel here. Given this split in authority, and given the importance of the issue, I believe the matter merits the consideration of the entire court.

OPPOSITION BRIEF

(2)
No. 88-493

Supreme Court, U.S.
FILED
NOV 21 1988

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA, PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity
Commission
Washington, D.C. 20547

26 PM

QUESTIONS PRESENTED

1. Whether there is a qualified privilege that permits a university to withhold peer review materials that are responsive to an EEOC subpoena and relevant to a charge that the university has violated Title VII of the Civil Rights Act of 1964 by denying a professor tenure on the basis of her sex and national origin.

2. Whether the district court was obligated to dismiss the EEOC's subpoena enforcement action in deference to petitioner's anticipatory suit —~~x~~ which was brought when the enforcement action was imminent for the purpose of avoiding unfavorable legal precedent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument	5
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974) ...	10
<i>Banerjee v. Board of Trustees</i> , 648 F.2d 61 (1st Cir.), cert. denied, 454 U.S. 1098 (1981)	8
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	9, 12, 13
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	14
<i>Dinnan, In re</i> , 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982)	6
<i>EEOC v. Associated Dry Goods Corp.</i> , 449 U.S. 590 (1981)	13
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	3, 4, 5, 6, 7, 8, 9, 11, 12, 15
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	7-8, 10, 11
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1933)	6
<i>Factors Etc., Inc. v. Pro Arts, Inc.</i> , 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979)	14
<i>Gibson v. Florida Legislative Committee</i> , 372 U.S. 539 (1963)	9, 10, 11
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	6, 8, 12
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	12

IV

Cases — Continued:

Page

<i>Jepsen v. Florida Board of Regents</i> , 610 F.2d 1379 (5th Cir. 1980)	6
<i>Kerotest Mfg. v. C-O-Two Fire Equipment Co.</i> , 342 U.S. 180 (1952)	14
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977)	6
<i>Kunda v. Muhlenberg College</i> , 621 F.2d 532 (3d Cir. 1980)	9
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982)	6, 8, 12
<i>Manning v. Trustees of Tufts College</i> , 613 F.2d 1200 (1st Cir. 1980)	9
<i>Pacesetter Systems, Inc. v. Medtronic, Inc.</i> , 678 F.2d 93 (9th Cir. 1982)	4, 14
<i>Perez v. Ledesma</i> , 401 U.S. 82 (1971)	15
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981)	15, 16
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	11
<i>Smith v. University of North Carolina</i> , 632 F.2d 316 (4th Cir. 1980)	9
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	9, 10, 11
<i>Tempco Elec. Heater Corp. v. Omega Engineering</i> , 819 F.2d 746 (7th Cir. 1987)	14, 15
<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	12
<i>United States v. Bryan</i> , 339 U.S. 323 (1950)	12
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	12
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	8
<i>United States v. Powell</i> , 379 U.S. 48 (1964)	8
<i>West Gulf Maritime Ass'n. v. ILA Deep Sea Local 24</i> , 751 F.2d 721 (5th Cir.), cert. denied, 474 U.S. 844 (1985) ..	14
<i>Zahorik v. Cornell University</i> , 729 F.2d 85 (2d Cir. 1984)	8

Constitution, statutes, regulation and rule:

U.S. Const.:

Amend. I	3, 5, 10, 12, 13
Amend. V	3
Administrative Procedure Act, 5 U.S.C. 553	4

V

Statutes, regulation and rule — Continued:

Page

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	2
§ 706(b), 42 U.S.C. 2000e-5(b)	2, 1a
§ 709(a), 42 U.S.C. 2000e-8(a)	2, 7, 1a
§ 709(e), 42 U.S.C. 2000e-8(e)	13
§ 710, 42 U.S.C. 2000e-9	2, 7, 10, 1a
National Labor Relations Act § 11, 29 U.S.C. 161	2, 7, 10, 2a
29 C.F.R. 1601.22	13
Fed. R. Civ. P.:	
Rule 26(b)(1)	8
Rule 26(c)	8

Miscellaneous:

H.R. Rep. 92-238, 92d Cong., 2d Sess. (1971)	13
--	----

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA, PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 850 F.2d 969 (3d Cir. 1988). The orders of the district court (Pet. App. A34-A35) are unreported. The EEOC's order refusing to modify its subpoena (Pet. App. A29-A33) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1988. A petition for rehearing was denied on August 11, 1988 (Pet. App. A28). The petition for a writ of certiorari was filed on September 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 706(b), 709(a) and 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), 2000e-8(a), 2000e-9, and of Section 11 of the National Labor Relations Act, 29 U.S.C. 161, which is incorporated by reference in Title VII, are reproduced in an appendix to this brief (pages 1a-3a, *infra*).

STATEMENT

1. In 1985, petitioner denied tenure to Rosalie Tung, an Associate Professor in the Management Department of petitioner's Wharton School. Tung filed a charge with the Equal Employment Opportunity Commission, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that petitioner had denied her tenure because of her national origin and sex. The EEOC began an investigation into this charge. Pet. App. A4-A5.

As part of that investigation, the Commission requested a statement of petitioner's position and information relevant to the charge. Petitioner provided some of the information requested, but refused to provide peer review materials relating to Tung and five male candidates who had been considered for tenure. In this case, Tung had been recommended for tenure by the members of her department, but that recommendation was overridden by petitioner's Personnel Committee, assertedly on the basis of her scholarship, the subject of peer review.

Consequently, the Commission issued a subpoena *duces tecum* for (Pet. App. A5):

1. Copies of Tung's tenure file;
2. Copies of the tenure file for the five other candidates considered with Tung for tenure;
3. The identity, tenure status, and qualifications of those individuals who comprised the tenure commit-

tees for the University's management department from June, 1984 to the present; and

4. The identity of all members of the University's personnel committee.

2. Petitioner applied for a modification of the subpoena to exclude peer review materials. It also urged the Commission to "adopt a balancing approach reflecting the constitutional and societal interests inherent in the peer review process and * * * all feasible [methods] to minimize the intrusive effects of its investigations" (Pet. App. A30). On April 10, 1987, the Commission denied these requests (*id.* at A5, A29-A33). It found that the information requested was necessary to determine whether Ms. Tung had been treated differently than those male candidates who had received tenure (*id.* at A30; see *id.* at A33). The EEOC also relied on the fact that the Third Circuit had refused to recognize a qualified privilege for peer review materials in *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (1985), cert. denied, 476 U.S. 1163 (1986). The EEOC refused to apply petitioner's proposed balancing approach in this case, explaining that its statutory obligation to investigate charges of discrimination required it to explore whether reasons advanced by an employer to justify an unfavorable employment decision were pretextual (Pet. App. A32). The Commission advised petitioner that subpoena enforcement proceedings would be initiated unless petitioner complied with the subpoena within 20 days (*id.* at A33).

Three days before the expiration of the 20-day grace period, petitioner brought suit in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief and an order quashing the administrative subpoena. The complaint alleged that the Commission had violated the First and Fifth Amendments to the Constitution and, citing the April 10, 1987 EEOC

Determination as evidence of a nationwide rule requiring disclosure of peer review materials, the Administrative Procedure Act, 5 U.S.C. 553. Pet. App. A6.

3. Thereafter, the Commission initiated an action to enforce its subpoena in the United States District Court for the Eastern District of Pennsylvania. On September 1, 1987, the district court entered a brief order denying petitioner's motion to dismiss that action and ordering petitioner to comply with the subpoena (Pet. App. A35). Two days thereafter, the District of Columbia district court denied the Commission's motion to dismiss petitioner's action in that forum.

4. The court of appeals affirmed the Pennsylvania district court's refusal to dismiss this case and its enforcement of the EEOC's subpoena (Pet. App. A1-A27). The district court's decision not to stay its proceedings in deference to petitioner's prior-filed District of Columbia suit was reviewable, the court of appeals held, for abuse of discretion (Pet. App. A4). The panel explained that the so-called "first-filed rule" is not "a rigid or inflexible rule to be mechanically applied" (Pet. App. A14, quoting *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982)), and that "[b]ad faith . . . and forum shopping have always been regarded as proper bases for departing from the rule" (Pet. App. A14). Viewing the totality of the circumstances, the court of appeals held that the district court had not abused its discretion under the facts of this case. The court of appeals observed that the timing of petitioner's filing indicated "an attempt to preempt an imminent subpoena enforcement" (*id.* at A16), and that petitioner's "effort to evade" *Franklin & Marshall* by commencing its own action in the District of Columbia "violate[d] the equitable basis of the [first-filed] rule" (Pet. App. A18). The court summarized (*id.* at A18):

Because the first-filed rule is based on principles of comity and equity, it should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action.

This conclusion, it continued, was supported by the need to assure prompt resolution of Title VII claims and the EEOC's obligation to attempt to resolve discrimination suits through conciliation (*id.* at A18-A19).

With respect to the enforceability of the Commission's subpoena, the court of appeals held that its *Franklin & Marshall* decision foreclosed the claim that the First Amendment relieved petitioner of its obligation to produce peer review materials responsive to the subpoena (Pet. App. A22).¹ The court also concluded that petitioner had not raised any of several grounds on which an administrative subpoena may properly be challenged (*id.* at A23-A24). Finally, the court of appeals remanded for consideration of whether petitioner should be permitted to produce the disputed records with the names and identifying information of persons other than Tung redacted (*id.* at A26-A27). Except to this extent, it affirmed the district court's order enforcing the EEOC's subpoena (*id.* at 27).

ARGUMENT

The decision of the court of appeals is correct and fully consistent with the decisions of this Court. It raises no issue on which there is a clear conflict among the circuits, such as might now justify review by this Court.

¹ The court of appeals held that petitioner could raise its First Amendment claim but not its APA arguments as a defense to enforcement of the subpoena (Pet. App. A21, A23). The court reasoned that even if the EEOC had adopted a rule that was invalid under the APA, the Commission would still have statutory authority to issue and enforce its subpoena in this case (*id.* at A24).

A. 1. Contrary to petitioner's contention, there is no "clear and apparently intractable" conflict on the question "whether confidential peer review materials should be protected against compelled disclosure by the Commission" (Pet. 10). Apart from the Third Circuit's decisions in *Franklin & Marshall* and this case, only the Seventh Circuit, in *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (1983), has decided whether a university may assert a qualified privilege in response to an EEOC subpoena. On the facts of that case, the Seventh Circuit held only that there was "a qualified privilege protecting against the disclosure of *the identities of the academicians participating in the peer review process*" (*id.* at 337-338 (emphasis added)). Here, the Third Circuit has remanded for further proceedings on the question whether the identities of persons participating in Tung's tenure review process may be redacted from documents petitioner has been ordered to produce. It is thus unclear whether the ultimate disposition of this case will conflict with the narrow qualified privilege recognized in *Notre Dame*. Accordingly, there is no more reason for this Court to grant review now than there was when this Court declined to review the *Franklin & Marshall* decision.

It is true that some courts of appeals have, in private Title VII actions, expressed support for a "balancing" approach toward discovery of various types of peer review information. *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977); *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980); *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982). Contra, *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982) (rejecting a

balancing test).² That, of course, was also true at the time review was denied in *Franklin & Marshall*. But in any event, these decisions are not inconsistent with the holdings of either this case or *Franklin & Marshall*. The EEOC's statutory authority to issue an administrative subpoena in aid of its obligation to investigate charges of discrimination is quite different from an attempt to obtain civil discovery in a private Title VII action.

In Title VII, Congress directed the EEOC to investigate charges of discrimination and gave it express statutory "access to, for purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation" (42 U.S.C. 2000e-8(a)). Congress also gave the EEOC authority to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question" (29 U.S.C. 161, incorporated in 42 U.S.C. 2000e-9; page 2a, *infra*). While a court called upon to enforce such a subpoena may consider whether an employer has a legal privilege to withhold responsive documents, these statutes do not permit a case-by-case balancing approach. Congress has already drawn that balance in favor of disclosure. The district court has a "responsibility to satisfy itself that the charge [of discrimination] is valid and that the material requested is 'relevant' to the charge, * * * and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *EEOC v. Shell Oil Co.*, 466

² All of the district court and state court decisions cited in the petition (at 13 n.16) are also private civil actions, not EEOC subpoena enforcement proceedings.

U.S. 54, 72 n.26 (1984).³ As the court of appeals noted (Pet. App. A34), petitioner does not contend that the EEOC's subpoena in this case failed to meet these standards, and there was thus no basis on which to question the EEOC's express statutory authority to obtain "any evidence" that is relevant and relates to the charge of discrimination. See *Shell Oil*, 466 U.S. at 72 n.26.

In private civil discovery, by contrast, courts do have authority, under Fed. R. Civ. P. 26(c), to issue orders to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense" and to tailor discovery to the circumstances of a particular case. See also Fed. R. Civ. P. 26(b)(1). Though their reasoning does not always recognize this distinction, the civil discovery cases can be reconciled with *Franklin & Marshall* on this basis.⁴ Moreover, in most of these cases, the courts have found in favor of production of peer review information, reasoning that if a university uses the peer review evaluations to justify an unfavorable employment decision, the plaintiff should be given an opportunity to discover them to demonstrate that the explanation was pretextual. *E.g.*, *Gray*, 692 F.2d at 906-907; *Lynn*, 656 F.2d at 1342-1343.⁵

³ See *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-654 (1950).

⁴ We take no position on the question whether a court may properly withhold relevant peer review materials from a private litigant in a civil action or, if so, what standards should apply. However those issues are resolved, the standards that govern a private litigant's discovery do not limit the EEOC's express statutory powers.

⁵ In numerous cases, courts have reviewed peer review materials to determine claims of discrimination. *Zahorik v. Cornell University*, 729 F.2d 85, 89-91 (2d Cir. 1984); *Banerjee v. Board of Trustees*, 648 F.2d 61, 64 n.5 (1st Cir. 1981, cert. denied, 454 U.S. 1098 (1981)); *Smith v.*

The experience of the lower courts since the Court's refusal to review *Franklin & Marshall* also belies petitioner's claim that any disagreement among the circuits regarding the EEOC's subpoena power is urgent (Pet. 13). Apart from this case, petitioner has cited no decision in the three years since *Franklin & Marshall* was decided which has addressed the issue whether a university may assert a qualified privilege for peer review information in response to an EEOC subpoena, and we are aware of none. This record suggests that any conflict among the courts of appeals is not so pressing as to require the Court's attention at this time.⁶

2. There is no inconsistency between the Third Circuit's refusal to balance away any portion of the EEOC's express investigatory authority and any of this Court's decisions. See Pet. 15-17. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963), this Court considered the limits of the power of state legislatures to

University of North Carolina, 632 F.2d 316, 323-331 (4th Cir. 1980); *Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1203-1204 (1st Cir. 1980).

⁶ Regardless of what approach is taken to peer review materials, it will be impossible to guarantee those participating in tenure decisions that peer review materials "will [be] confidential" (Pet. 13). Even under a balancing test, those materials would be discoverable when a university relies on peer review to justify denying tenure. Thus, at most, adoption of petitioner's position would provide some unknown degree of additional confidentiality which, because petitioner's proposed balancing test could not be applied until after the fact, will be immeasurable when the process is underway. If they are aware of the law, persons participating in tenure decisions must contemplate the possibility that tenure review materials will be discoverable if a charge of discrimination is made, and that cannot change. See *Branzburg v. Hayes*, 408 U.S. 665, 702-703 & n.39 (1972) (emphasizing the dubious worth of a reporters privilege applied ad hoc). Moreover, the issue raised in the petition does not bear on a university's primary conduct; it is clear that discrimination is forbidden.

conduct open-ended investigations of allegedly subversive activity. Both cases held that there was an insufficient state interest shown for particular inquiries which tended to interfere with First Amendment expression and association. None of the features of those cases which the Court found decisive are present here. The EEOC's jurisdiction to investigate is not "broad and ill-defined" (*Sweezy*, 354 U.S. at 245), nor is there any question whether Congress "wants [the relevant] questions answered" (*id.* at 254).⁷ Congress has expressly authorized the EEOC to investigate claims of discrimination, and has specified the subject of the investigation—a particular charge of discrimination. Congress has also indicated that the policy against discrimination that these investigations serve is one of the "highest priority." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

Further, by contrast to the free-form legislative investigations in issue in *Sweezy* and *Gibson*, the procedures established by Title VII guarantee the necessity for and relevance of materials sought in an administrative subpoena. Under Title VII, only evidence that is relevant to the charge on which an investigation is based can be subpoenaed. See *Shell Oil*, 466 U.S. at 68-69. A party being investigated may request the Commission to revoke the subpoena if the evidence requested "does not relate to any matter under investigation" and the EEOC is required to do so if it makes such a finding. 42 U.S.C. 2000e-9, incorporating 29 U.S.C. 161. See pages 1a-2a, *infra*. A district

⁷ In *Sweezy*, the state legislature constituted the state attorney general as a "one-man legislative committee" and established no meaningful limits on the scope of his investigation (354 U.S. at 237 & n.4). Against this background, this Court stated that it could not determine whether the particular questions *Sweezy* refused to answer were authorized and held, accordingly, that imposition of a contempt sanction would represent a denial of due process (354 U.S. at 254-255).

court asked to enforce a subpoena in turn must determine that the charge is valid and the material requested is relevant. *Shell Oil*, 466 U.S. at 72 n.26. These procedures foreclose any finding, like that on which *Gibson* was based, of an "utter failure to demonstrate the existence of any substantial relationship between" (372 U.S. at 554-555) a request for information and a legitimate subject of inquiry.

In this case, the EEOC has specifically explained the basis for its request for information on petitioner's peer review of Tung and those considered with her: "The information is necessary in order to determine whether Ms. Tung was treated differently than those who received tenure" (Pet. App. A30), and the relevance of the subpoenaed materials for that purpose is not in dispute. Finally, whereas *Sweezy* and *Gibson* involved inquiries into associations and opinions of those called to testify, "the EEOC's role is to determine whether or not there is evidence to support a charge that an employment decision was based upon reasons protected by" Title VII. (*Franklin & Marshall*, 775 F.2d at 117). In view of these features of the statute, there can be no substantial claim that the Title VII subpoena procedure resembles the investigations involved in *Sweezy* and *Gibson* or involves any violation of constitutional rights.⁸

⁸ Justice Powell's concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), was addressed to the importance of a diverse study body, and did not suggest that universities were entitled to a privilege not available to other employers that are the subject of an EEOC investigation. It is also noteworthy that, in *Bakke*, the Court scrutinized a university's decision whether to admit a student and held that that decision had been unlawful. *Bakke* does not suggest that universities are at all exempt from investigations into the possibility that they have discriminated against members of the academic community.

3. More to the point are cases in which this Court has emphasized that privileges are not favored because they "contravene the fundamental principle that 'the public * * * has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980), quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950). See *Herbert v. Lando*, 441 U.S. 153, 175 (1979); *United States v. Nixon*, 418 U.S. 683, 709-710 (1974). In *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Herbert v. Lando*, *supra*, this Court rejected claims comparable to petitioner's for First Amendment privileges covering, respectively, a newsman's confidential sources and the editorial processes of those responsible for an allegedly libelous publication. Factors comparable to those relied on in *Branzburg* and *Herbert* would also compel rejection of petitioner's proposed privilege.⁹

One may acknowledge "the importance of confidentiality in the peer review process," as *Franklin & Marshall* did, but nevertheless recognize that it must yield "[i]n the face of the clear mandate from Congress" (775 F.2d at 115). See *Herbert v. Lando*, 441 U.S. at 171-174 (analyzing claims that editorial exchanges would be chilled absent a

⁹ Inquiry into petitioner's peer review of Tung relates to "a specific claim of injury arising from" a tenure decision that is alleged to have been discriminatory (*Herbert v. Lando*, 441 U.S. at 174). Particularly when, as in this case, a university justifies denying tenure on the basis of a process of peer review, information on how that process operated is directly relevant to a claim of discrimination. Thus, Title VII "necessarily contemplate[s] examination of" the peer review process to determine whether it is pretextual (*id.* at 172). See *Lynn*, 656 F.2d at 1347-1348; *Gray*, 692 F.2d at 905-906. In discharging its statutory mandate to investigate charges of discrimination, the EEOC is entitled to gather "direct as well as indirect evidence" (*Herbert v. Lando*, 441 U.S. at 172). "[A]n alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation" (*Franklin & Marshall*, 775 F.2d at 116).

privilege). The First Amendment does not prohibit incidental burdens on First Amendment interests that result from the enforcement of civil laws of general applicability. *Branzburg*, 408 U.S. at 682. Even the litigation inherent in a "balancing approach" or "qualified privilege" would undercut Title VII's requirement that charges of discrimination be resolved promptly (Pet. App. A19). See *Branzburg*, 408 U.S. at 705 (reporters privilege would embroil courts in "preliminary factual and legal determinations"). These considerations, among others, foreclose recognition of a qualified privilege under the standards previously applied by this Court.¹⁰

B. The court of appeals' ruling that the district court did not abuse its discretion by refusing to stay or dismiss this suit in deference to petitioner's anticipatory District of Columbia action is also correct and does not conflict with the decisions of other courts of appeals or of this Court. Its application of general principles of comity and judicial discretion to the particular facts of this case raises no legal issue warranting this Court's review.

¹⁰ Congress acted specifically to extend Title VII to academic institutions, a fact which cautions against judicially-created exceptions from its enforcement provisions for this class of employer. The immunity from Title VII originally extended to academic institutions was removed in 1972 based upon Congress's finding that "discrimination in educational institutions is especially critical." H.R. Rep. 92-238, 92d Cong., 2d Sess. 19-20 (1971).

It is also noteworthy that the EEOC is prohibited, under threat of criminal penalties, from disclosing subpoenaed records to the public. 42 U.S.C. 2000e-8(e). The only disclosures permitted are to charging parties or witnesses where disclosure is deemed necessary for securing appropriate relief, or interested government agencies. 29 C.F.R. 1601.22. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981).

The court of appeals was fully justified in describing the so-called "first-filed rule" as "grounded on equitable principles" (Pet. App. A15). When two federal courts have concurrent jurisdiction of a dispute, "no precise rule has evolved," though "the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Consistent with its underpinnings, the "first-filed rule" is not "a rigid or inflexible rule to be mechanically applied" (Pet. App. A14, quoting *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982)). As the many decisions cited in the court of appeals' opinion reflect, the courts of appeals are in agreement that discretion is involved in the application of this "rule." See *Kerotest Mfg. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183-184 (1952).¹¹

As the court of appeals also observed, the equities underlying the customary presumption in favor of the first-filed suit are not persuasive when, as in this case, a party has filed an action in anticipation of an imminent enforcement suit, which has been withheld to allow a grace period for voluntary compliance. Pet. App. A15; *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Tempco Elec. Heater Corp. v. Omega Engineering*, 819 F.2d 746, 749-750 (7th Cir. 1987). In fact, an overly rigid adherence to the first-filed rule in that situation would be inconsistent with principles of comity and wise judicial administration, since it would encourage unseemly races to the court-

¹¹ Petitioner suggests (Pet. 20) that *West Gulf Maritime Ass'n v. Deep Sea Local 24*, 751 F.2d 721 (5th Cir.), cert. denied, 474 U.S. 844 (1985), requires dismissal of the second-filed suit, regardless of the circumstances. However, *West Gulf* quotes with approval many decisions that make clear the equitable and flexible basis of the "first-filed rule" and adopts their approach.

house (*Tempco*, 819 F.2d at 750). Cf. *Perez v. Ledesma*, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., concurring in part and dissenting in part) ("The federal declaratory judgment is not a prize to the winner of a race to the courthouse * * *").

The court of appeals cited several factors in support of its holding that the district court was within its discretion in not applying the first-filed rule to this case. They included the timing of petitioner's suit (three days before the expiration of the grace period for voluntary compliance with of the Commission's subpoena), petitioner's acknowledgment that *Franklin & Marshall* "presented a problem" to petitioner's plan to contest the subpoena (Pet. App. A17), the fact that petitioner's suit "feature[d] a direct challenge to the * * * subpoena," and "two themes emphasized by Congress when it enacted Title VII," the requirement that claims be promptly resolved and the EEOC's obligation to resolve disputes through conciliation. Pet. App. A18. The court of appeals emphasized that the first-filed rule "will usually be the norm" and that departures from that rule must be justified by "exceptional circumstances" (*id.* at A19). This carefully circumscribed and factbound ruling represents no "departure from the standards applied in other circuits" (Pet. 19), does not threaten to "swallow up the general rule" favoring the first suit filed (Pet. 18), and does not present any substantial legal issue warranting review by this Court.

The court of appeals' reliance on the fact the petitioner chose its District of Columbia forum in an attempt to avoid the precedential effect of *Franklin & Marshall* does not conflict with *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). See Pet. 17-18. *Piper* did not involve parallel suits pending in separate forums or the principles of comity that are applicable in that situation. *Piper's* holding that a plaintiff may not defeat dismissal of an action under the

doctrine of *forum non conveniens* by showing that a dismissal will lead to the application of less favorable law does not help petitioner in this case. On the contrary, the Court "emphasized the need to retain flexibility" in applying *forum non conveniens* (454 U.S. at 249), a point inconsistent in spirit with petitioner's advocacy of rigid application of the first-filed rule. Further, the Court indicated that it meant to preserve the possibility of dismissal when a plaintiff has chosen a particular forum "solely in order to harass the defendant or take advantage of favorable law" (*id.* at 249 n.15). *Piper* does not, in short, suggest that federal courts must ignore efforts, like petitioner's, to forum shop for favorable law.

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity
Commission

NOVEMBER 1988

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), provides in pertinent part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer * * * (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. * * *

Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a), provides:

In connection with any investigation of a charge filed under Section [706] of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this [title] and is relevant to the charge under investigation.

Section 710 of Title VII, 42 U.S.C. 2000e-9, provides:

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 16 of Title 29 of [the National Labor Relations Act (49 Stat. 455)] shall apply.

(1a)

Section 11 of the National Labor Relations Act, 29 U.S.C. 161, provides in pertinent part:

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title —

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place

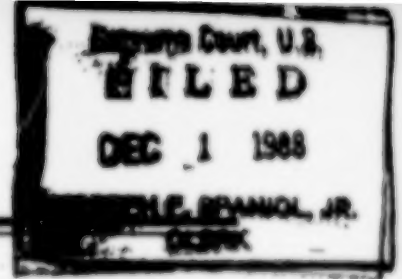
in the United States or Territory or possession thereof, at any designated place of hearing.

Court aid in compelling production of evidence and attendance of witnesses

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States * * * within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

REPLY BRIEF

(3)
No. 88-493



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY-BRIEF OF PETITIONER

Of Counsel:

SHELLEY Z. GREEN
NEIL J. HAMBURG
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

STEVEN B. FEIRSON
(Counsel of Record)
ALAN D. BERKOWITZ
NANCY J. BREGSTEIN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Petitioner

December 1, 1988

TABLE OF AUTHORITIES

Cases:	Page
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	passim
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	6
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (1983)	passim
<i>Gibson v. Florida Legislative Committee</i> , 372 U.S. 539 (1963)	7
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	1
<i>Lever v. Northwestern University</i> , No. 84 C 11025 (N.D. Ill., May 21, 1987)	5
<i>McKillop v. University of California</i> , 386 F. Supp. 1270 (N.D. Cal. 1975)	4
<i>Rollins v. Farris</i> , 108 F.R.D. 714 (E.D. Ark. 1985) ..	5
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	7
<i>Zaustinsky v. University of California</i> , 96 F.R.D. 622 (N.D. Cal. 1983)	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA,
v. *Petitioner,*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY BRIEF OF PETITIONER

The Third Circuit held, in this case and in *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986), that confidential academic peer review materials, though covered by the First Amendment, are entitled to *no* protection from compelled disclosure. The Third Circuit explicitly acknowledged that its refusal to afford any protection to these materials conflicts with the decisions of the Seventh and Second Circuits.¹ Yet the Commission denies that the decision below conflicts with decisions of other Courts of Appeals, or with decisions of this Court involving academic freedom and the First Amendment. The Commission also questions whether the adoption of a balancing test, as

¹ See 775 F.2d at 114 (citing *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (1983); *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982)).

advocated by the University, would make a material difference to the peer review process.

We reply as follows: (1) The Commission cannot argue away the existence of a conflict between the Third and Seventh Circuits, which have reached irreconcilable conclusions on the need for protection of peer review materials subpoenaed by the EEOC. Moreover, the Commission's novel attempt to distinguish this case, involving an EEOC subpoena, from cases in other circuits involving discovery by private plaintiffs, ignores the fact that the cases themselves *never* have discussed, let alone relied upon, this distinction. (2) The distinction suggested by the Commission does not reconcile the conflict in the Circuits. The conflict is about whether peer review materials are entitled to any protection against compelled disclosure. The identity of the party seeking disclosure is irrelevant to that determination, and is relevant, if at all, only to the balancing test that follows from the recognition of First Amendment protection. In any event, the distinction urged by the Commission vanishes upon scrutiny. (3) The Third Circuit's decision conflicts with First Amendment decisions of this Court, and the Commission's argument to the contrary is really an argument on the merits and should be considered by this Court only after full briefing and argument. (4) The adoption of a balancing approach would substantially minimize the chill on protected First Amendment activities that now exists because of the Commission's absolutist approach to the investigation of Title VII charges involving university tenure decisions.

1. The University has shown (Pet. 10-15) that the Courts of Appeals are sorely divided in their respective analyses and holdings concerning efforts—by private plaintiffs and the Commission—to compel disclosure of confidential peer review materials in Title VII cases. The reality of the conflict and its detrimental effect on this country's institutions of higher learning are attested to by scholarly articles (see Pet. 11 n.13), district court deci-

sions (see *id.* at 13 n.16), and by the *amicus* briefs filed in support of the petition by Princeton, Brown, Stanford, Harvard, and Yale Universities, and by the American Association of University Professors.

The Commission concedes, as it must, that the Seventh Circuit has recognized a qualified privilege protecting against the disclosure of peer review materials subpoenaed by the Commission, see Opp. 6, while the Third Circuit has refused to recognize such a privilege in the same context. The Commission attempts to deny this conflict by claiming that the Seventh Circuit in *Notre Dame* held "only that there was 'a qualified privilege protecting against the disclosure of the identities of the academicians participating in the peer review process.'" Opp. 6 (quoting 715 F.2d at 331) (emphasis by the Commission). But protection of the identities of the peer reviewers was all that was sought by the university in *Notre Dame*. The Seventh Circuit noted that the case before it was "unique in that Notre Dame is voluntarily producing redacted files to the EEOC." 715 F.2d at 337 n.4. The court expressly cautioned that its decision "must not be read as an endorsement for granting the EEOC access to redacted files in all instances. . . . Clearly, there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.*

Moreover, even taking the Seventh Circuit's holding at its narrowest, that holding recognizes the applicability of a qualified privilege as a protection against unfettered Commission intrusion into the peer review process, in contrast to the Third Circuit's complete deference to the Commission upon a showing of minimal relevance. On that fundamental point, there is a square conflict between the Third and the Seventh Circuits.

The Third Circuit's refusal to adopt a balancing approach to accommodate the competing interests also con-

flicts with decisions of other Courts of Appeals. The Commission grudgingly concedes that "some courts of appeals have, in private Title VII actions, expressed support for a 'balancing' approach toward discovery of various types of peer review information." Opp. 6 (citing cases). The Commission contends, however, that these decisions "are not inconsistent with the holdings of either this case or *Franklin & Marshall*." *Id.* 7. The Commission asserts, without support, that "[t]he EEOC's statutory authority to issue an administrative subpoena in aid of its obligation to investigate charges of discrimination is quite different from an attempt to obtain civil discovery in a private Title VII action." *Id.* The Commission posits this distinction as the basis on which "the civil discovery cases can be reconciled with *Franklin & Marshall*" Opp. 8.

The distinction offered by the Commission, however, finds no support in the cases. Not only is it true, as the Commission acknowledges (at 8), that "their reasoning does not always recognize this distinction"; in fact, *none* of the cases adopts or even mentions, let alone relies on, any distinction between EEOC subpoenas and private discovery requests. One would think that if this distinction mattered at all, some court out of the many that have considered the issue would at least have mentioned it.

On the contrary, the courts generally have cited each other in express agreement or disagreement on the question whether peer review materials are entitled to some protection from compelled disclosure, regardless of the context in which the issue arose. Thus, when the Seventh Circuit recognized "a qualified academic freedom privilege" in *Notre Dame*, it stated explicitly that in doing so it was "join[ing] other courts," including the Second Circuit in *Gray* (which was a private action under 42 U.S.C. § 1981) and district courts in two private Title VII suits—*McKillop v. University of California*, 386 F.

Supp. 1270 (N.D. Cal. 1975), and *Zaustinsky v. University of California*, 96 F.R.D. 622 (N.D. Cal. 1983). See 715 F.2d at 337.²

The Third Circuit certainly did not attempt to "reconcile" its decision with the *Gray* decision on the basis of the different contexts of the two actions, even though *Gray* was a private suit under § 1981; and the Third Circuit explicitly refused "to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach," 775 F.2d at 114, without distinguishing between the different context of those two cases.³

None of the courts in what the Commission terms "the civil discovery cases" have distinguished between an EEOC investigation and a Title VII suit by a private plaintiff, regardless of which side they took on the question of disclosure or protection of peer review materials. Courts have cited *Notre Dame*, a subpoena enforcement case, in support of affording some protection for peer review materials sought by private plaintiffs during discovery, and other courts have cited *Franklin & Marshall*,

² In *Lever v. Northwestern University*, No. 84 C 11025 (N.D. Ill., May 21, 1987), a private Title VII suit, the court relied heavily on *Notre Dame* without ever mentioning that the standard for private suits might be different—whether stricter or more lenient—than that for subpoena enforcement actions. The court obviously was aware of the different nature of the actions, as it repeatedly and deliberately referred to a generic "party seeking discovery" rather than to "the plaintiff" or "the Commission."

³ Similarly, without any reference to the Commission's purported distinction, the holding in *Franklin & Marshall* was expressly followed—and the holding of *Notre Dame* expressly rejected—in *Rollins v. Farris*, 108 F.R.D. 714, 720 (E.D. Ark. 1985), a private Title VII suit, after the court noted that the Third Circuit had "flatly" rejected the conclusions of the Second and Seventh Circuits, and that the Third and Fifth Circuits "have expressly rejected the contention that a plaintiff must show anything more than relevance" *Id.* at 718.

also a subpoena enforcement case, as support for the absence of any protection in private actions. See cases cited at Pet. 12-13. Thus, the Commission is wrong in its suggestion that its distinction neatly reconciles the cases. But even if the Commission's newly-discovered distinction held the key to resolving the conflict, its private understanding of the point would not eradicate the confusion in the lower courts, which seem to think that subpoena enforcement actions by the Commission and discovery requests by private plaintiffs raise the same legal issue.⁴

2. The lower courts are right: the cases do raise the same legal issue. That issue, which is what the conflict in the Circuits is all about, is whether peer review materials are entitled to any protection from compelled disclosure, no matter who is seeking disclosure. If they are not, as the Third and Fifth Circuits have held, then the identity of the party seeking disclosure is irrelevant. If they are entitled to some protection, thereby requiring a balancing of competing interests, then the distinction urged by the Commission—based on its asserted special role in investigatory proceedings—merely becomes, at best, a factor to be weighed in the balance.

In fact, the special status claimed by the Commission is illusory. First, the Commission nowhere explains why its statutory authority to obtain information relevant to a Title VII "probable cause" investigation is worthy of more weight than a private Title VII plaintiff's right,

⁴ When the Commission opposed the petition for certiorari in *Franklin & Marshall*, it relegated to one footnote the distinction it now advocates with such conviction. See Brief for the Equal Employment Opportunity Commission in Opposition, *Franklin & Marshall College v. EEOC*, No. 85-1439, at 11 n.10. In that opposition, the Commission claimed that any conflict in the Circuits was "nascent at best, minor in any event, and likely to recede in light of this Court's recent decision in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984)." *Id.* at 5. The Commission no longer makes these claims.

under Rule 26(b) of the Federal Rules of Civil Procedure, to obtain information relevant to a final judicial determination of the merits of the alleged statutory violation. In fact, it makes little sense to differentiate between a Commission investigation under Title VII and an ensuing judicial action under that same statute: they are inextricably linked. Unlike statutory schemes that contain parallel and independent authorization for government enforcement and private rights of action, Title VII requires the Commission to investigate all charges of employment discrimination before a suit by either the Commission or a private litigant may be instituted. Thus, the agency investigation and the later court action are part and parcel of one statutory scheme. Moreover, as a practical matter, the distinction urged by the Commission is illusory. Since the Commission now routinely requests peer review materials and routinely shares those materials with the charging party, neither the Commission nor a private litigant will have to resort to Rule 26 discovery in a later action to gain confidential peer reviews.⁵

3. In arguing that the decision below does not conflict with this Court's precedents, the Commission seeks to distinguish *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963), on the ground that those decisions involved state interests insufficient to justify interference with rights protected by the First Amendment. The Com-

⁵ To the extent that the Commission claims a special status because of Title VII's requirement that it resolve charges of discrimination promptly (see Opp. 13), that claim is undermined by the delay in this case of nearly a year between the Commission's issuance of its subpoena and its subsequent enforcement action. If the Commission means to suggest that it will be less likely than a private plaintiff to engage in "fishing expeditions," we submit that the Commission's history of blanket requests for information, with no willingness to modify its demands in light of the importance of confidentiality to the peer review process, belies that contention.

mission asserts that here the procedures established by Title VII for investigating discrimination charges "guarantee the necessity for and relevance of materials sought in an administrative subpoena." Opp. 10. While that may be the Commission's view, it has not been the view of the lower courts that have balanced the Commission's investigative needs against the need to protect the confidentiality of the peer review process, as a component of academic freedom protected by the First Amendment. See, e.g., *EEOC v. University of Notre Dame du Lac*, 715 F.2d at 335-37. The University's position in this regard is sufficiently strong to warrant consideration by this Court after full briefing and argument, and should not be rejected on the basis of 2½ pages of argument in the Commission's opposition.

4. The Commission implies that "[r]egardless of what approach is taken to peer review materials," it will be impossible to "guarantee" confidentiality, and therefore, "at most, adoption of petitioner's position would provide some unknown degree of additional confidentiality" Opp. 9 n.6. As far as the University is concerned, however, "some . . . additional confidentiality" would be far superior to the Commission's absolute rule requiring automatic disclosure. While disclosure would be required on some occasions under a balancing approach, disclosure would not be the norm. The University, unlike the Commission, seeks an accommodation of the competing interests, not absolute guarantees of confidentiality. This type of accommodation is far from unusual in the First Amendment area; while the chilling effect would not be eradicated, it would be minimized to accommodate the Commission's interest in obtaining peer review materials when they are truly necessary to its investigation. Obviously, this is a far more responsible approach than the "all or nothing" approach of the Commission.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

SHELLEY Z. GREEN
NEIL J. HAMBURG
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

December 1, 1988

STEVEN B. FEIRSON
(Counsel of Record)
ALAN D. BERKOWITZ
NANCY J. BREGSTEIN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Petitioner

AMICUS CURIAE

BRIEF

NOV 17 1988

No. 88-493

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS, *AMICUS CURIAE*,
IN SUPPORT OF THE PETITION

Of Counsel:

WILLIAM W. VAN ALSTYNE
Duke University Law School
Durham, NC 27706
(919) 684-2219

ANN H. FRANKE *
MARTHA A. TOLL
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

*Counsel for the
American Association of
University Professors*

November 20, 1988

* Counsel of Record

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
REASONS FOR GRANTING THE WRIT	4
A. The Existing Conflict In The Circuits Is Ex- tremely Detrimental To Academic Institutions And Professors Across The Nation	4
B. The Third Circuit's Refusal To Adopt A Bal- ancing Approach Warrants Review By This Court	7
CONCLUSION	12
APPENDIX A:	
AAUP Preliminary Statement on Judicially Com- pelled Disclosure in the Nonrenewal of Faculty Appointments	1a
APPENDIX B:	
Citations to Law Review Commentary on the Dis- closure of Faculty Peer Review Deliberations	4a

TABLE OF AUTHORITIES

Cases:	Page
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972).....	2, 3
<i>Brown v. Socialist Workers '74 Campaign Committee</i> , 459 U.S. 87 (1982)	11
<i>Burt v. Board of Regents of Univ. of Neb.</i> , 757 F.2d 242 (10th Cir. 1985), <i>vacated as moot sub nom. Connolly v. Burt</i> , 106 S. Ct. 1372 (1986)	6
<i>Delaware State College v. Ricks</i> , 449 U.S. 250 (1980)	2
<i>EEOC v. Franklin and Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), <i>cert. denied</i> , 476 U.S. 1163 (1986)	2, 5
<i>EEOC v. University of Notre Dame Du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	5
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	2, 5, 8
<i>In Re Dinnan</i> , 661 F.2d 426 (11th Cir. 1981), <i>cert. denied</i> , 457 U.S. 1106 (1982)	5, 7
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	9, 10
<i>Krotkoff v. Goucher College</i> , 585 F.2d 675 (4th Cir. 1978)	3
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	11
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975)	9
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	9, 11
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)....	10
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. (4 Wheat.) 518 (1819)	12

Other Authorities:

AAUP Documents

AAUP POLICY DOCUMENTS AND REPORTS (1984)	2
1940 Statement of Principles on Academic Freedom and Tenure	2
1966 Joint Statement on Government of Colleges and Universities	3

TABLE OF AUTHORITIES—Continued

	Page
1971 Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments	3
1976 Statement on Discrimination	3
1980 Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments, 67 ACADEME: BULL. of AAUP 27 (Feb./Mar. 1981)	4, 7, 10
"Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs," American Council on Education (1981)	3
"EEOC's Tough Stand to Continue in 1986, Warning Goes Out to Employers Who Refuse to Turn Over Documents," 129 LAB. REL. 293 (BNA 12/9/85)	6
Finkin, M., "On 'Institutional' Academic Freedom," 61 TEX L. REV. 817 (1983)	10
Rehnquist, W., "Sunshine in the Third Branch," 16 WASHBURN L.J. 559 (1977)	9
"Report of the Committee on Confidentiality in Matters of Faculty Appointments," U. CHI. REC. 165 (May 22, 1979)	5
Van Alstyne, W., "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," in THE CONCEPT OF ACADEMIC FREEDOM (E. Pincoffs ed. 1975)	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA,
v. *Petitioner,*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS, *AMICUS CURIAE*,
IN SUPPORT OF THE PETITION

The American Association of University Professors files this brief *amicus curiae* in support of the petition for a writ of certiorari, with the consent of both parties.

INTEREST OF THE AMICUS

The American Association of University Professors ("AAUP" or "Association") is a national membership organization of 40,000 faculty members and research scholars in all the academic disciplines. Founded in 1915, it is the nation's oldest and largest body dedicated to the advancement of higher education from the perspective of faculty concerns.

One of AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the academic community. AAUP policy statements address the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, the elimination of discrimination, and many other facets of academic life.¹ State and federal courts throughout the country, including this Court, have frequently referred to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their students.² The Association participates in litigation as *amicus curiae* on a selective basis and here makes a rare appearance in support of a petition for a writ of certiorari.³

AAUP has long been concerned with the integrity of procedures for the award of tenure and the renewal of probationary faculty appointments. It has promulgated policy statements on these matters which serve as models for the academic community.⁴ An essential ingredient in

¹ The major AAUP policy statements are compiled in AAUP POLICY DOCUMENTS AND REPORTS (1984), a copy of which is in the collection of the Supreme Court library. The AAUP statements referred to herein may be found in this volume unless otherwise referenced.

² E.g., *Delaware State College v. Eicks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Graig v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

³ AAUP also filed a brief as *amicus curiae* in support of the unsuccessful petition for a writ of certiorari in *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986).

⁴ The seminal 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by AAUP and the Association of American Colleges, is the "most widely-accepted academic definition

procedures concerning faculty appointments and tenure is the exercise of judgment by senior faculty colleagues. The academic community takes as a fundamental premise that colleagues and fellow specialists are best able to assess the scholarly contributions and potential of individual faculty members. The 1966 *Joint Statement on Government of Colleges and Universities*, formulated by AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, states that the faculty has the primary role in making decisions about the status of faculty appointments. This "peer review" process places in the hands of faculty members the basic responsibility for determination in matters of appointment, reappointment, and the award of tenure. Full candor and cooperation are essential to the process, and faculty members rely on the strong tradition of confidentiality protecting this exchange of professional opinion.⁵

Commensurate with the Association's concern about procedures for faculty evaluation is its historic commitment to the elimination of discrimination based on national origin, race, sex, and other factors not directly relevant to professional performance. AAUP's 1976 *Statement on Discrimination* condemns such bias in the academic community.

of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). Over one hundred educational organizations and learned societies have endorsed the 1940 *Statement*. In 1971 the Association adopted the derivative *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* setting forth procedures to safeguard against decisions adversely affecting a faculty member that would be violative of academic freedom, impermissibly discriminatory, or based on insufficient consideration. See *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1971).

⁵ See "Report of the Committee on Confidentiality in Matters of Faculty Appointments," U. CHI. REC. 165 (May 22, 1979); "Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs," American Council on Education (1981).

The official interests of AAUP thus embrace both sides of the first question presented for review in this case. AAUP is equally concerned with the unsuccessful candidate for tenure or renewal of appointment who reasonably alleges that the decision-making process was tainted by discrimination, and with the faculty members charged with primary responsibility for evaluation of the candidate. The instant case brings into conflict the values of eliminating discrimination in the peer review process, on the one hand, and protecting the candid expression of opinion by faculty peers, on the other. The Association examined these respective interests in 1980 and set forth its accommodation of the competing concerns in its *Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, reprinted as Appendix A. By virtue of its appreciation and comprehensive analysis of the central conflicting considerations here, AAUP is uniquely qualified to address the Court as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

A. The Existing Conflict In The Circuits Is Extremely Detrimental To Academic Institutions And Professors Across The Nation.

The University of Pennsylvania has accurately set forth the sharp split among the Circuits on the principal question presented in this case (Petn. 10-15).⁶ The conflicting lines of authority are clearly drawn. The Eleventh Circuit, which was the first Court of Appeals to address the issue of what protection from compelled

⁶ AAUP takes no position at present on whether, given the facts of the underlying discrimination controversy, the University of Pennsylvania should be compelled to disclose confidential peer review materials. We challenge only the legal standard applied below, and we also express no view about the second question presented by the university in its petition, concerning the "first-filed" rule of federal comity.

disclosure should be afforded confidential peer review materials, ruled that such materials could be ordered disclosed without regard to the need for confidentiality in the peer review process. *In re Dinnan*, 661 F.2d 426 (1st Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982). In *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986), and again in the instant case, the Third Circuit joined the Eleventh Circuit in affording no protection to confidential peer review materials.

The Third Circuit in *Franklin and Marshall* acknowledged that its decision could not be reconciled with the entirely different approach of the Second and Seventh Circuits, which have sought to accommodate the conflicting interests at stake. In *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), in which AAUP participated as *amicus curiae*, the Second Circuit adopted a balancing test, weighing the need for disclosure against the educational institution's interest in confidentiality. The Seventh Circuit took a slightly different tack, recognizing a "qualified academic freedom privilege" protecting the peer review process, which may be overcome by a substantial showing of "particularized need" for the information. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337, 338 (7th Cir. 1983).

AAUP fully expects that this issue will continue to arise with frequency, and that the conflict in the Circuits will not abate and cannot be resolved by the Courts of Appeals.⁷ In the meantime, the existence of the EEOC policy and the lack of a consistent judicial response will continue to visit injury on individual professors, institutions of higher learning, and the tenure process generally. The EEOC continues to issue subpoenas and to

⁷ The continuing proliferation of law review commentary on the compelled disclosure of faculty peer review materials further underscores the unsettled state of the law. Appendix B contains a selected listing of articles.

pursue subpoena enforcement actions.⁸ The disarray in the state of the law has left the academic community unsure of its individual and collective rights and responsibilities.

Because of the conflict in the Circuits, the rights of professors now hinge on the vagaries of geography. Yet scholarship and academic interests are not circumscribed by state boundaries.⁹ A professor may receive inquiries from peer review committees at institutions anywhere in the country. In the current situation, the degree of confidentiality accorded by federal law to the professor's response depends on where the committee is located. AAUP regularly confronts the confusion occasioned by the conflict in the Circuits as it receives requests for advice and assistance from faculty members and administrators nationwide about the legal standards governing compelled disclosure of peer deliberations.

In short, the question presented by the University of Pennsylvania in this case is of widespread concern in the higher education community. The issue is of great significance not only to the nation's academic community but also to the nation at large involving as it does the proper balance between fair treatment of individual academicians and the integrity of a process widely recognized as the bulwark of excellence in our colleges and universities. The controversy, moreover, is bound to re-

⁸ Subpoena enforcement litigation rose from 10% of the Commission's litigation docket in 1980 to 25% in 1985. See "EEOC's Tough Stand to Continue in 1986, Warning Goes Out to Employers Who Refuse to Turn Over Documents," 120 LAB. REL. REP. 293-94 (BNA, 12/9/85). The EEOC Office of Public Information reports that in both 1986 and 1987, subpoena enforcement actions constituted 20% of the Commission's litigation docket.

⁹ See *Burt v. Board of Regents of Univ. of Neb.*, 757 F.2d 242 (10th Cir. 1985), vacated as moot sub nom. *Connolly v. Burt*, 106 S.Ct. 1372 (1986) (whether in personam jurisdiction may be based on letter of reference mailed by faculty member to distant state).

cur often. Absent review by this Court, the issue will continue to vex the academic community and the lower courts. AAUP therefore joins the University of Pennsylvania in urging this Court to resolve the conflict on this important question.

B. The Third Circuit's Refusal To Adopt A Balancing Approach Warrants Review By This Court.

Even beyond the existence of a conflict in the Circuits, this Court's review of the Third Circuit's legal standard is warranted. That standard, which fails to give any weight to the legitimate institutional and constitutional interests involved in the peer review process, is destructive of sound academic practice and conflicts with this Court's First Amendment precedents.

1. *Sound academic practice.* AAUP gave considerable attention to the competing interests at stake in the wake of the *Dinnan* case, *supra*, which resulted in the imprisonment of Professor James Dinnan of the University of Georgia for his refusal to comply with a judicial order to divulge his vote on a tenure candidate. The Association had earlier been contacted by Professor Maija Blaubergs, the unsuccessful tenure candidate whose allegations of discrimination led to Professor Dinnan's defiance. Committees within AAUP addressed in principle the respective rights of tenure candidates and peer evaluators, without passing judgment on the merits of the particular case. The Association's resulting policy position, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, was adopted unanimously by AAUP's governing Council, as Association policy, in 1980. 67 *Academe: Bull. of AAUP* 27 (Feb./Mar. 1981). While the *Preliminary Statement* was AAUP's initial response to a new and difficult issue, we view the policy as having withstood the test of time. It is reprinted here as Appendix A.

The *Preliminary Statement* advocates a balancing approach, stating in essence that in order to defeat the qualified privilege protecting the peer review process, a disappointed tenure candidate must raise a "sufficient inference that some impermissible consideration was likely to have played a role" in the adverse decision. Such a preliminary showing would prevail over the presumption of the integrity of the academic process. AAUP adopted the statement as the optimal accommodation of the interests of all parties, best serving the academic community as a whole. In developing its policy, the Association sought to balance the need for confidentiality in the peer review process against the need for disclosure to vindicate civil rights. The resulting standard does not permit a hollow allegation of discrimination to intrude into the sensitive deliberations of a peer review committee, but rather first requires a showing of possible merit to the individual's discrimination claim. AAUP submits that through this approach the competing values are appropriately reconciled. In *Gray v. Board of Higher Education*, *supra*, 692 F.2d at 907, the Second Circuit expressly endorsed AAUP's position as "carefully designed" and as striking "an appropriate balance between academic freedom and educational excellence on the one hand and individual rights to fair consideration on the other" The Third Circuit's decision is plainly at odds with the balanced position adopted by AAUP on the basis of its experience in developing standards reflective of sound academic practice.

The Third Circuit's decisions in *Franklin and Marshall* and this case fail to accord an appropriate degree of deference to the needs of academic institutions. Here those needs include candor and confidentiality in the peer review process. The Third Circuit's excessively broad standard will, we submit, weaken the soundness of

the process.¹⁰ Colleagues within an institution, no longer able to rely on appropriate confidentiality, will be increasingly reluctant to offer candid opinions, particularly negative ones. Experts from outside the institution, asked to provide evaluations, may decline entirely to offer their judgment. The reluctance would be grounded not so much, as some have suggested, in faint-heartedness, as in decency and professional concern for the public standing and reputation of the candidate. As this Court has indicated in the context of the Freedom of Information Act, 5 U.S.C. § 552, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Unfettered disclosure of faculty evaluations will thus serve to reduce the reliability of the evaluations, to the serious detriment of standards of excellence in higher education.

2. *First Amendment precedents.* As the University of Pennsylvania has demonstrated in its petition (at 15-17), the Third Circuit's treatment of this issue violates this Court's precedents requiring a balancing of governmental and academic interests, as well as this Court's teachings that statutes should be construed, if possible, to avoid constitutional questions.

Academic freedom is a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) At issue in this case is not the teaching or publication activity of an individual scholar, but rather the collective in-

¹⁰ Cf. W. Rehnquist, "Sunshine in the Third Branch," 16 *WASHBURN L.J.* 559 (1977) (examining hypothetically the adverse impact on the Court's decision-making process were its conferences not confidential).

terests of the faculty and the institution in effective faculty evaluations.¹¹ Justice Frankfurter listed first among the "four essential freedoms" of the university the freedom "to determine for itself on academic grounds who may teach." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Interference with the university's autonomy in deciding who may serve on its faculty, even without any particular impact on individual teaching or research, is destructive of academic freedom. As explained in AAUP's *Preliminary Statement on Judicially Compelled Disclosure*, "individuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance." Appendix A, at 2a. This case thus raises significant constitutional issues regarding the degree to which the government may intrude into academic decisions that are central to the proper functioning of a college or university.

The Third Circuit expressly refused to give these interests any weight, deviating from precedents of this Court holding that when competing values clash with the legitimate needs of academic institutions, a balancing approach is warranted. In *Sweezy v. New Hampshire*, *supra*, the Court reversed the criminal conviction of a professor who refused to answer to the State attorney general about his political beliefs and classroom lectures. Justice Frankfurter's pivotal concurring opinion recognized that government intrusion could be justified only under "exigent and obviously compelling" circumstances. *Id.* at 262. In *Keyishian v. Board of Regents*, *supra*, the Court used a balancing approach to invalidate New York's requirement of a loyalty oath for state university

¹¹ See M. Finkin "On 'Institutional' Academic Freedom," 61 TEX. L. REV. 817, 843 (1983); W. Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," in THE CONCEPT OF ACADEMIC FREEDOM (E. Pincoffs ed. 1975).

faculty members. And in *Regents of the University of California v. Bakke*, *supra*, the Court struck down a state medical school's special admissions program that created separate admissions criteria and set aside separate places for minority applicants. "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted," the Court also emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Id.* at 314.

The fact that Title VII confers on the EEOC certain investigatory powers does not mean that these powers automatically prevail in the face of competing constitutionally protected interests. See, e.g., *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (Ohio statute compelling disclosure of contributors to minor political party violated First Amendment). Indeed, the Third Circuit's simplistic endorsement of the EEOC's statutory powers in the face of a First Amendment challenge violates this Court's teachings that the federal courts should interpret statutes, where possible, to avoid conflict with constitutional requirements. See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979).

CONCLUSION

The EEOC's practice of demanding across-the-board disclosure of confidential peer review materials, without regard to legitimate competing academic interests, is brought into sharp focus in the context of this particular case. But this case is "not of ordinary importance," since "[i]t affects not this college only, but every college" *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 599 (1819). To resolve the tensions created by the clear conflict in the Circuits on this important issue, and to fashion a solution that will accommodate the competing interests, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Of Counsel:

WILLIAM W. VAN ALSTYNE
Duke University Law School
Durham, NC 27706
(919) 684-2219

ANN H. FRANKE *
MARTHA A. TOLL
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

*Counsel for the
American Association of
University Professors*

November 20, 1988

* Counsel of Record

APPENDICES

APPENDIX A

**A Preliminary Statement on Judicially Compelled Disclosure
in the Nonrenewal of Faculty Appointments**

The following statement, approved by Committee A and adopted by the Council at their meetings in November, 1980, addresses the issues posed in seeking disclosure of faculty members' positions in a discrimination complaint. These issues have gained national attention in recent months as a result of the imprisonment of Professor James Dinnan of the University of Georgia after he refused to comply with a judicial order to divulge his vote on the tenure candidacy of Professor Maija Blau-bergs.

A dramatic episode arising at the University of Georgia presents complex and difficult questions. What follows expresses no judgment about the facts or the merits of that case, as to which we believe the academic community to be insufficiently informed.

We believe that the harsh action of imprisonment, which we deplore, has overshadowed the underlying issues: first, the necessity of proper procedures for rectifying discrimination; second, the proper scope of judicial compulsion in such cases, to which this statement is principally addressed.

Faculty members have the right to decisions on the renewal of their appointments free of impermissible considerations, such as considerations violative of academic freedom or prejudice with respect to race, sex, religion, or national origin. This Association has buttressed this principle by concluding that, in the event of an adverse decision on renewal, the faculty member should be advised of the reasons which contributed to that decision, have an opportunity to request a reconsideration by the decision-making body, and have available a standing hearing committee to entertain any complaint that an

impermissible consideration played a role in the decision. Moreover, in the context of such proceedings the Association has recognized that in appropriate circumstances the participants in the decision-making process may permissibly be called upon to account for their actions.

At the same time, institutions ought to be free from impermissible external intrusions or constraints in making nonrenewal decisions. This freedom is claimed not only as a matter of prudence, resting upon the higher competence of those engaged in the enterprise to select their peers and the chilling effect upon that exercise of judgment engendered by external constraints, but as a matter of principle: individuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance. Therefore, when litigation involves judicially compelled disclosure of the actions and motivations of the faculty participants in the nonrenewal process, the courts should recognize the value of maintaining institutional integrity.

We believe it inappropriate for a court to compel disclosure of the actions and motivations of the individual participants in a nonrenewal decision without first weighing the facts and circumstances asserted by the complainant. A judgment must then follow that those facts and circumstances raise a sufficient inference that some impermissible consideration was likely to have played a role to overcome the presumption in favor of the integrity of the academic process. That is, the inference must be sufficiently strong to defeat the claim, albeit a qualified one, that faculty members may properly assert to a degree of privilege that shields their actions and thought processes from judicial inquiry. Among the factors that a court may properly weigh in making that determination are the adequacy of the procedures employed in the nonrenewal decision, the adequacy of the reasons offered in defense of the decision, the adequacy of the review

procedures internal to the institution, statistical evidence that might give rise to an inference of discrimination, factual assertions of statements or incidents that indicate personal bias or prejudices on the part of the participants, the availability of the information sought from other sources, and the importance of the information sought to the issues presented.

We reiterate, however, that this statement of general principle does not represent a judgment on whether or not a proper weighing of these factors occurred in the particular case that gave rise to our concern.

APPENDIX B

Citations to Law Review Commentary on the Disclosure
of Faculty Peer Review Deliberations

"Academic Freedom Privilege: An Excessive Solution to the Problem of Protecting Confidentiality," 51 U. Cin. L. Rev. 326 (1982)

"Academic Freedom Privilege in the Peer Review Context: *In Re Dinnan and Gray v. Board of Higher Education*," 36 Rutgers L. Rev. 286 (1984)

"Academic Freedom vs. Title VII: Will Equal Employment Opportunity Be Denied on Campus," 42 Ohio St. L.J. 989 (1981)

Adach, J., "Title VII and the Authority of the EEOC to Subpoena Confidential Tenure Review Materials: *Equal Employment Opportunity Commission v. Franklin and Marshall College*," 28 B.C.L. Rev. 131 (1986)

"Autonomy and Accountability: The University of California and the State Constitution," 38 Hastings L.J. 927 (1987)

"Balancing Academic Freedom and Civil Rights: Toward an Appropriate Privilege for the Votes of Academic Peer Review Committees," 68 Iowa L. Rev. 585 (1983)

"Challenge to Antidiscrimination Enforcement on Campus: Consideration of an Academic Freedom Privilege," 57 St. John's L. Rev. 546 (1983)

"Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Providing a Title VII Sex Discrimination Suit in Academia," 60 N. Car. L. Rev. 438 (1982)

Corngold, E., "Title VII and Confidentiality in the University," 12 J. L. & Educ. 587 (1983)

DeLano, M., "Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?" 14 J. Coll. & Univ. L. 121 (1987)

"Discovery of Tenure Proceedings: Through the Privilege Barrier," 20 Hous. L. Rev. 1447 (1983)

"Drawing the Line on Academic Freedom: Rejecting an Academic Peer-Review Privilege for Tenure Committee Deliberations," 64 Wash. U.L.Q. 1271 (1986)

"Due Process in Decisions Relating to Tenure in Higher Education," 39 Rec. A.B. City N.Y. 392 (1984) (authored by the Special Committee on Education and the Law of the Association of the Bar of the City of New York) (reprinted in 11 J. Coll. & Univ. L. 323) (1984)

"Evidence—A Privilege Based on Academic Freedom Does Not Insulate a University from Disclosing Confidential Employment Information," 52 Miss. L.J. 493 (1982)

Fishbein, E., "New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities," 12 J. Coll. & Univ. L. 381 (1985)

Gregory, J., "Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom," 16 U.C.D. L. Rev. 1023 (1983)

Hill, J., Hill, E., "Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?" 22 Am. Bus. L.J. 209 (1984)

Kaplan, D., Cogan, B., "Case Against Recognition of a General Academic Privilege," 60 U. Det. J. Urb. L. 205 (1983)

Kluger, E., "Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response," 15 J.L. & Educ. 319 (1988)

- Kohlburn, W., "The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation," 65 Wash. U.L.Q. 445 (1987)
- Lee, B., "Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation," 9 J. Coll. & Univ. L. 279 (1983)
- Liethen, M., "Academic Freedom and Civil Discovery," 10 J. Coll. & Univ. L. 113 (1984)
- Mahoney, I., "Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions," 28 B.C.L. Rev. 559 (1987)
- Mobilia, M., "The Academic Freedom Privilege: A Sword or a Shield?" 9 Vt. L. Rev. 43 (1984)
- Partain, J., "A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?" 40 Vand. L. Rev. 1397 (1987)
- "Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege," 69 Calif. L. Rev. 1538 (1981)
- Tepker, H., Jr., "Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference," 16 U.C.D. L. Rev. 1047 (1983)
- "Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases," 21 Suffolk U.L. Rev. 691 (1987)

AMICUS CURIAE

BRIEF

No. 88-493

Supreme Court, U.S.

FILED

NOV 21 1988

JOSEPH F. SPANIOLO, JR.

CLERK

In The
Supreme Court of the United States

OCTOBER-TERM, 1988

UNIVERSITY OF PENNSYLVANIA,

Petitioner.

-VS-

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

BRIEF OF PRINCETON UNIVERSITY, BROWN UNIVERSITY,
STANFORD UNIVERSITY, HARVARD UNIVERSITY, AND
YALE UNIVERSITY, AS *AMICI CURIAE*,
IN SUPPORT OF THE PETITION

JOHN F. MCCARTHY, JR.
MCCARTHY AND SCHATZMAN, P.A.
228 Alexander Street
Post Office Box 2329
Princeton, New Jersey 08543-2329
(609) 924-1199

Counsel for amicus curiae

Of Counsel:

Thomas H. Wright, Esq.

General Counsel

The Trustees of

Princeton University

318 Nassau Hall

Princeton, New Jersey 08544

(609) 452-5560

November 21, 1988

THE SUPERIOR APPELLATE PRINTING COMPANY

P.O. Box 363
Cranbury, N.J. 08512

Area Code 609
655-1122

Beverly Ledbetter Esq.
General Counsel
Brown University
1913 University Hall
Providence, RI 02912
(401) 863-3122

John J. Schwartz Esq.
Vice President and General Counsel
Stanford University
P.O. Box N
Stanford, CA 94305
(415) 723-3761

Daniel Steiner Esq.
Vice President and General Counsel
Harvard University
Massachusetts Hall
Cambridge, MS 02138
(617) 495-4778

Dorothy K. Robinson Esq.
General Counsel
Yale University
P.O. Box 1074 Yale Station
451 College Street
New Haven, CT 06520
(203) 432-4949

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
CONCLUSION	5

TABLE OF AUTHORITIES

	Page
<i>Bergman v. Bowling Green State University</i> , 820 F.2d 1124 (6th Cir. 1987)	4
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3rd Cir. 1985)	3
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	4
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	4
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1979)	4
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337, 1347 (9th Cir. 1981)	4
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265, 312 (1978)	3
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234, 263 (1957)	3

INTEREST OF THE AMICUS CURIAE

The Trustees of Princeton University, Brown University in Providence in the State of Rhode Island, and Providence Plantations, Leland Stanford, Jr. University, President and Fellows of Harvard College and Yale University ("the Universities"), are private institutions of higher education. The Universities make extensive use of confidential academic peer review materials in reaching their tenure decisions.

The Universities derive confidential peer review materials from two sources. The first source is from within the Universities, usually confidential evaluations from the tenured faculty members in the candidate's own department. The second source is from outside the Universities. As an important part of their procedure for making tenure decisions, the Universities request evaluations from distinguished scholars in the field of the tenure candidate who are not on their own faculties. The Universities consider the receipt of completely candid assessments to be a crucial element of the tenure process. Consequently, these outside scholars, who are under no obligation to participate in the Universities' tenure review processes, are given promises of confidentiality.

The Universities are convinced that the compromise of the confidentiality of these peer review materials would result in a significant diminution of their ability adequately to evaluate candidates for tenure. For the Universities, as for other colleges and universities, the decision to grant tenure is a critically important academic decision, setting the courses of the institution and the individual involved for thirty or more years. The decision is one in which the academic freedom of both the candidate and the institution is directly implicated.

The Universities seek leave to appear as *amicus curiae* because of the importance of the confidentiality issue to their tenure process.

ARGUMENT

THE CONFLICT IN THE CIRCUITS CONCERNING THE DISCOVERABILITY OF CONFIDENTIAL PEER REVIEW MATERIALS SHOULD BE RESOLVED BY THIS COURT AS SOON AS POSSIBLE

The tenure process determines who will teach, what will be taught, what research will be conducted and, to a very large extent, the nature of academic discussion and debate. Thus, the tenure process lies at the heart of academic freedom and implicates core First Amendment values. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). The ability to maintain a substantial degree of confidentiality for evaluations of tenure candidates by their peers, known as "peer reviews", is vital to the tenure process. If academic institutions could not assure confidentiality for peer reviews, it would be very difficult for them to secure frank appraisals of candidates for tenure.

Currently, there is an irreconcilable and apparently permanent conflict in the Courts of Appeals with respect to the degree of protection, if any, to be afforded to peer reviews. The Third Circuit, following the precedent established in *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986), and the Fifth Circuit, see *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), refuse to afford any protection at all to peer reviews. Three other Circuits -- the Second, Fourth, and Seventh -- have all adopted a rule of affording some protection to peer reviews by requiring a balancing of competing interests before any intrusion in the

process will be allowed.¹ See *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982; *Keyes v. Lenoir Fhyne College*, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977); *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983).

The conflicting rules adopted by these Circuits have injected substantial uncertainty about confidentiality into the peer review procedure and thus have had, and continue to have, a debilitating effect on the entire tenure selection process at schools across the country. This uncertainty, which has existed for more than six years, has confused, concerned, and inhibited academicians who are asked to provide tenure evaluations. This conflict imposes an unnecessary burden on the ability of institutions of higher education to select the best qualified tenure candidates, and thereby impermissibly infringes First Amendment interests.

The issues raised by the University of Pennsylvania's petition are of great importance to institutions of higher education. Having endured six years of conflict in the Circuits, those institutions need this Court to rule definitively on this issue and provide guidance to the lower courts. Therefore, we respectfully request that the petition for a writ of certiorari in this case be granted.

¹ The Ninth Circuit in *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1347 (9th Cir. 1981), and the Sixth Circuit, in an unpublished opinion in *Bergman v. Bowling Green State University*, 820 F.2d 1224 (6th Cir. 1987), also appear to have accepted some form of balancing test.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

McCARTHY AND SCHATZMAN, P.A.

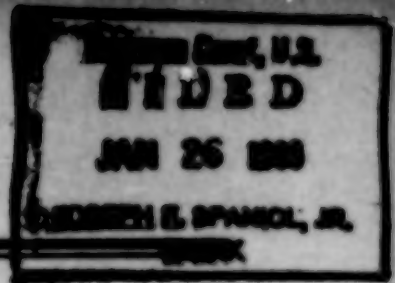
Attorneys for amicus curiae

By: 
John F. McCarthy, Jr.

Dated: November 18, 1988

JOINT APPENDIX

(6)
No. 88-493



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

JOINT APPENDIX

STEVEN B. FERSON
DECHERT PRICE & RHODES
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000

*Counsel of Record for
Petitioner*

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

*Counsel of Record for
Respondent*

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1988
CERTIORARI GRANTED DECEMBER 12, 1988

36 PK

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Complaint Filed By the University of Pennsylvania in the United States District Court for the District of Columbia, No. 87-1199 (filed May 1, 1987)	4
Application of the Equal Employment Opportunity Commission for Order to Show Cause Why a Sub- poena Should Not Be Enforced, filed in the United States District Court for the Eastern District of Pennsylvania, Misc. No. 87-0294 (filed June 29, 1987)	15
Order of the United States District Court for the District of Columbia denying the EEOC's motion to dismiss (Sept. 3, 1987)	31
Order of the United States District Court for the Dis- trict of Columbia denying the EEOC's motion to stay further proceedings (Oct. 5, 1987)	32
Order of the United States Supreme Court Granting Certiorari (Dec. 12, 1988)	33

Note: The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear in the appendix to the Petition for Certiorari at the following pages:

	Page
EEOC Determination on Petition to Modify Subpoena Duces Tecum, <i>In the Matter of: Rosalie Tung v. University of Pennsylvania</i> (April 10, 1987)	A-29
Order of the United States District Court for the Eastern District of Pennsylvania denying discovery, <i>Equal Employment Opportunity Commission v. University of Pennsylvania</i> , Misc. No. 87-0294 (Sept. 1, 1987)	A-34
Order of the United States District Court for the Eastern District of Pennsylvania ordering enforcement of the EEOC subpoena and denying the University's motion to dismiss, <i>Equal Employment Opportunity Commission v. University of Pennsylvania</i> , Misc. No. 87-0294 (Sept. 1, 1987)	A-35
Opinion of the United States Court of Appeals for the Third Circuit, <i>Equal Employment Opportunity Commission v. University of Pennsylvania</i> , No. 87-1547 (June 23, 1988)	A-1
Order of the United States Court of Appeals for the Third Circuit denying rehearing, <i>Equal Employment Opportunity Commission v. University of Pennsylvania</i> , No. 87-1547 (Aug. 11, 1988)	A-28
Opinion of the United States Court of Appeals for the Third Circuit, <i>Equal Employment Opportunity Commission v. Franklin and Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	A-36

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
June 19, 1987	Plaintiff's Application for Order to Show Cause Why a Subpoena Should Not Be Enforced
June 23, 1987	Order entered that Respondent University of Pennsylvania appear on 7/2/87 and show cause why an order should not be issued
June 29, 1987	Defendant's motion to dismiss filed
July 2, 1987	Plaintiff's response to motion to dismiss filed
July 2, 1987	Hearing held on plaintiff's motion to dismiss
July 10, 1987	Defendant's reply memorandum in support of motion to dismiss filed
July 15, 1987	Petitioner's opposition to respondent's discovery request filed
July 24, 1987	Respondent's memorandum in support of its discovery requests filed
Sept. 1, 1987	Order entered that the University will comply with the subpoena duces tecum issued by the EEOC and will produce the information that is requested in the subpoena within 10 days from the entry of this order. Further ordered that the motion to dismiss is denied as moot
Sept. 1, 1987	Order entered that the EEOC does not have to respond to the respondent's request because the respondent's request to conduct such discovery is denied
Sept. 1, 1987	EEOC's motion for an order denying respondent's discovery request filed
Sept. 4, 1987	Respondent's motion for expedited briefing filed

DATE	PROCEEDINGS
Sept. 4, 1987	Respondent's motion for stay pending appeal filed
Sept. 4, 1987	Respondent's Notice of Appeal filed
Sept. 10, 1987	Applicant's response to motion for stay pending appeal filed
Sept. 14, 1987	Order entered that Court's order of 9/1/87 will not be stayed pending the outcome of appeal of said orders and the respondent must comply with orders as issued
Sept. 16, 1987	Stipulation of counsel filed re: Plaintiffs will not seek the documents it has subpoenaed in this matter nor seek to enforce the Court's order of 9/1/87
Sept. 23, 1987	Motion by appellant for stay pending appeal filed
Sept. 30, 1987	Motion by appellee for extra time to file responses to appellant's motion filed
Sept. 30, 1987	Clerk's order entered granting appellee's motion for extra time
Oct. 9, 1987	Response by appellee to motion for stay filed
Oct. 16, 1987	Order entered granting motion for stay
Oct. 16, 1987	Copy of above order sent to clerk of District Court
Feb. 12, 1988	Clerk's letter to counsel requesting, as soon as possible, copies of briefs submitted before the District Court of the District of Columbia, in <i>The Trustees of the University of Pennsylvania v. EEOC</i> , No. 87-1199, on the questions of subject matter jurisdiction, venue, failure to state a claim upon which relief could be granted, and stay of the District of Columbia proceedings

DATE	PROCEEDINGS
Feb. 18, 1988	Letter from EEOC advising that counsel for appellant would file requested briefs in the form of a Supplemental Joint Appendix
Feb. 25, 1988	Oral argument heard by Court of Appeals
July 8, 1988	Appellant's motion to permit attachment to appellant's petition for rehearing in banc together with memorandum of law in support of same
July 19, 1988	Opposition of EEOC to appellant's motion to permit attachment to petition for rehearing
Aug. 1, 1988	Order entered denying appellant's motion to permit attachment to petition for rehearing
Aug. 17, 1988	Motion by appellant for stay of mandate for 30 days filed
Aug. 26, 1988	Amended order entered on petition for rehearing denying the petition for panel rehearing and for rehearing before the Court in banc
Sept. 1, 1988	Order entered granting stay of the mandate to and including 9/17/88
Sept. 19, 1988	Notice to Clerk by appellant of filing petition for a writ of certiorari with the United States Supreme Court
Sept. 26, 1988	Certificate evidencing the docketing of this case on 9/19/88 at Supreme Court (No. 88-493) filed
Dec. 22, 1988	Letter dated 12/15/88 from Clerk of Supreme Court requesting certification filed

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 87-1199

JACKSON, J.

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA
110 College Hall
Philadelphia, Pennsylvania 19104,
Plaintiff,

v.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
2401 E Street, N.W.
Washington, D.C. 20507,
Defendant.

COMPLAINT

(For Declaratory Judgment and Injunctive Relief)

This is a case in which the Equal Employment Opportunity Commission ("EEOC"), without complying with the advance publication and opportunity for public participation requirements of 5 U.S.C. Section 553, has adopted a rule which requires total and absolute disclosure by colleges and universities of all peer evaluation material used in making tenure decisions. The EEOC has adopted this rule, and has taken action to enforce it, in reckless disregard of the need of educational institutions to maintain confidentiality with respect to this information and the fact that such an absolute and rigid disclosure requirement violates First Amendment values

long held to be inherent in tenure review process, a process which forms one of the critical foundations of academic freedom. The Trustees of the University of Pennsylvania ("University") asks only that the EEOC be required to balance properly the constitutional values which clearly are implicated by any such disclosure requirement and that the EEOC abide by the requirements of the Administrative Procedure Act before any final rule is adopted.

PARTIES

1. The University of Pennsylvania, is a private educational institution of higher learning which is a not-for-profit corporation located in Philadelphia, Pennsylvania.

2. Defendant, the Equal Employment Opportunity Commission, is an agency of the United States created by Congress pursuant to 42 U.S.C. Section 2000e-4(a) and charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* The EEOC's principal office is in the District of Columbia.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. Section 1331 in that plaintiff alleges violations of federal law. In addition, jurisdiction is proper under 28 U.S.C. Section 1337; 28 U.S.C. Section 1343(4); 28 U.S.C. Section 1361; 28 U.S.C. 2201; and 5 U.S.C. Section 702 *et seq.*

4. Venue in this District is proper under 28 U.S.C. Section 1391, subsections (b) and (e).

FACTS

Peer Review Process

5. The vast majority of institutions of higher learning in this nation maintain a tenure system for faculty members.

6. When an educational institution makes the decision to confer tenure, it grants, in essence, a continuous appointment until retirement to certain junior faculty members.

7. The purpose of tenure is to ensure academic freedom. Just as the constitution grants lifetime appointments to Federal Judges to guarantee independence of thought and action, universities grant tenure appointments to certain carefully selected faculty members for these same reasons.

8. Since tenure decisions have long-term consequences and since educational institutions have limited resources, it is vitally important that tenure decisions be as accurate as possible and be based upon an objective evaluation of the candidate's qualifications.

9. A critical portion of tenure decision-making is peer review. Peer review is the process by which individuals, both within and outside of the candidate's institution, evaluate on a confidential basis the accomplishments, particularly the scholarly accomplishments, of that candidate.

10. Those peer evaluations play a vital role in the ultimate determination of who is and who is not to be given the lifetime tenure appointment. In fact, the confidential peer review process is necessary to achieve and maintain academic excellence and plays an essential role in the proper and efficient functioning of colleges and universities.

11. Consequently, it is of the utmost importance that these evaluations be as candid as possible and that such candid participation in the process be encouraged rather than inhibited.

12. With respect to the peer review element of the tenure process, the University operates in the way described above, as do most colleges and universities. The

University applies rigorous standards to tenure applicants. There are many eligible, qualified candidates, but ultimately few successful ones.

The Instant Application of the EEOC's Absolute Disclosure Rule

13. Rosalie Tung was an Assistant Professor in the Management Department of the Wharton School of the University.

14. Tung was, along with many others, considered for tenure by the University. Like a majority of those candidates, Tung was denied tenure.

15. In August, 1985, Tung filed charges of discrimination with the EEOC, alleging that the University discriminated against her on the basis of her sex and Chinese national origin in denying her a tenured faculty position in the Management Department of the Wharton School of the University of Pennsylvania.

16. Throughout the course of the EEOC investigation, the University complied with the EEOC's requests for information and documents, including providing the charging party's entire personnel file and most of her tenure review file, a breakdown of those candidates eligible for and who received tenure at the Wharton School, salary history information for faculty members, a chart showing the number of evaluation letters solicited on behalf of candidates for tenure in the Management Department, information on vacancies and recruitment at the Wharton School, the non-confidential tenure review files for five other specific faculty members identified by the charging party, a detailed position statement and description of the tenure review process and the reasons for the decision in Tung's case.

17. In September, 1986, the EEOC issued a subpoena duces tecum seeking, among other things, confidential peer review information obtained by the University in

the tenure review process, not only for Tung, but for five other faculty members whose files Tung designated to be seized and searched.

18. On October 10, 1986, the University filed a petition with the EEOC requesting, *inter alia*, that it give weight to the constitutional and societal interests inherent in the peer review process and, after balancing those interests, modify the subpoena to exclude confidential peer review information from its ambit.

19. On April 10, 1987, the EEOC refused the University's request that it give weight to the constitutional and societal values at stake. Instead, the EEOC refused to engage in any balancing test and insisted upon absolute and total disclosure of all peer review materials.

20. The EEOC has stated that it will commence enforcement proceedings against the University unless it complies with the subpoena by May 4, 1987.

21. There are no further appeals available within the EEOC and, hence, the University has exhausted its administrative remedies.

COUNT I

(First Amendment to the United States Constitution)

22. Paragraphs 1 through 21 of this Complaint are incorporated herein by reference.

23. Basic academic decisions such as the selection of faculty through the tenure process is an academic freedom protected by the First Amendment to the United States Constitution.

24. However, the rule adopted by the EEOC explicitly refuses to recognize that academic freedom is deserving of any First Amendment protection.

25. The rule adopted by the EEOC requires total and absolute disclosure of all confidential peer review materials, without any consideration of the level of need for

such information or the harm to First Amendment interests such governmental intrusion would cause.

26. The EEOC also has stated that this rule of absolute disclosure—without consideration of First Amendment interests—and no First Amendment consideration will be energetically enforced through the use of the EEOC's subpoena power.

27. The adoption of this absolute disclosure/no First Amendment rule coupled with the EEOC's enforcement of that rule through its subpoena power has had and will continue to have a chilling effect on First Amendment rights.

28. The adoption of this rule and the EEOC's enforcement of it will act to chill the First Amendment right of academicians to participate in the tenure review process and to speak freely and without fear that their confidences will be betrayed.

29. Without some assurance that peer reviews will be kept confidential, academicians will not offer candid and frank evaluations.

30. Without some assurance that peer reviews will be kept confidential, many academicians will refuse to participate at all in the tenure review process.

31. Refusals to participate on the part of some, and less than totally candid and frank evaluations on the part of others, will destroy the tenure process as it now exists.

32. This destruction of the ability to maintain any confidentiality and the consequent injury to the tenure review process and academic freedom violates the First Amendment rights of the University and other similarly situated educational institutions.

33. If the EEOC's rule is permitted to remain in force and effect, the level and quality of academic freedom currently existing in this nation will be impaired severely.

34. The University and the other similarly situated educational institutions have been and continue to be irreparably harmed by the adoption and enforcement of the EEOC rule.

COUNT II

(Due Process Clause of the Fifth Amendment
to the United States Constitution)

35. Paragraphs 1 through 34 of this Complaint are incorporated herein by reference.

36. The University has a constitutionally protected liberty and property interest in its academic freedom and the right to be protected from arbitrary and capricious governmental action.

37. The confidential peer review process is critical in maintaining academic freedom.

38. In this case, the EEOC has not only used its subpoena power to attempt to rummage through the sensitive and confidential peer evaluations of the charging party, Tung, but the EEOC has used its governmental power to attempt to rifle the confidential portions of the files of other current and former University faculty members.

39. The EEOC has made no attempt to articulate any particularized need, let alone compelling necessity, for these types of documents in the investigation of this one individual charge.

40. The EEOC has made no attempt to conduct its investigation without trampling upon the First Amendment rights of those who participated in the peer reviews for these five individuals.

41. The EEOC has made no attempt to justify subjecting these five individuals and all those people and entities associated with their particular tenure decisions to the abusive intrusion contemplated here.

42. The EEOC's issuance of a subpoena without balancing the constitutionally protected interests of the University against the EEOC's need, if any, for these materials constitutes a deprivation of liberty without due process in violation of the Fifth Amendment to the Constitution.

43. The EEOC's issuance of a subpoena without balancing the constitutionally protected interests of the University against the EEOC's need, if any, for these materials was overbroad, arbitrary and capricious and, hence, in violation of the due process requirements of the Fifth Amendment to the Constitution.

44. The EEOC's failure to utilize alternative investigative methods to minimize the intrusive effect of its investigations on a fundamental right violates the due process requirements of the Fifth Amendment to the Constitution.

45. The EEOC's failure to abide by the statutory requirements of the Administrative Procedure Act violates the due process requirements of the Fifth Amendment to the Constitution.

46. The University has suffered and will continue to suffer irreparable harm if this conduct of the EEOC is permitted to continue.

COUNT III

(Administrative Procedure Act)

47. Paragraphs 1 through 46 of this Complaint are incorporated herein by reference.

48. In rendering its determination in plaintiff's petition to modify the subpoena, the EEOC made clear that it has rejected any balancing approach and is seeking information through its subpoena policies without giving weight to the constitutional and societal interests which underlie the peer review process.

49. By taking the above action, defendant has affected important substantive rights and has violated the Administrative Procedure Act by engaging in rule making without complying with the advance publication and opportunity for public participation requirements of 5 U.S.C. Section 553.

50. By taking the above action, defendant has acted arbitrarily, capriciously, contrary to law, and contrary to the constitutional rights of plaintiff and others similarly situated within the meaning and in violation of the Administrative Procedure Act. 5 U.S.C. Section 701 *et seq.*

51. By failing to promulgate a rule that recognizes the important societal and constitutional rights underlying the peer review process, defendant has acted arbitrarily, capriciously, contrary to law, and contrary to the constitutional rights of defendant and others similarly situated within the meaning and in violation of the Administrative Procedure Act, 5 U.S.C. Section 701 *et seq.*

52. The University has suffered and will continue to suffer irreparable harm if the unlawful conduct of the EEOC does not cease.

COUNT IV

(Quashing the Subpoena)

53. Paragraphs 1 through 52 of this Complaint are incorporated herein by reference.

54. Academic freedom is protected by the First Amendment to the Constitution.

55. Academic freedom encompasses the freedom of the University to determine for itself on academic grounds through its tenure process who may teach.

56. The confidential peer review process is an integral part of the tenure determination because it assures that

faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications.

57. The University's peer review process forms a critical basis of academic freedom and is protected by the First Amendment to the United States Constitution.

58. The EEOC in issuing this subpoena and rendering its determination on plaintiff's petition to modify the subpoena violated the First Amendment by refusing to give consideration to the University's constitutionally protected rights associated with the peer review process.

59. The EEOC in issuing this subpoena and rendering its determination in plaintiff's petition to modify the subpoena violated the First Amendment by refusing to recognize the University's qualified academic privilege.

60. The EEOC in issuing this subpoena and rendering its determination in plaintiff's petition to modify the subpoena violated the First Amendment by failing to use alternative investigative methods in order to minimize the intrusion on First Amendment rights.

WHEREFORE, the University requests that this Court:

(1) Enter a judgment and decree pursuant to 28 U.S.C. Sections 2201-02 declaring it was and is a violation of the First Amendment for the EEOC to fail to give weight to the constitutional and societal interests which underlie the peer review process.

(2) Enter a judgment and decree pursuant to 28 U.S.C. Sections 2201-02 declaring the EEOC's refusal to comply with the Administrative Procedure Act was unlawful.

(3) Enter a judgment and decree pursuant to 28 U.S.C. Sections 2201-02 that the EEOC, before issuing any subpoena, must utilize a balancing test to determine

whether the need for disclosure of information outweighs the First Amendment and other values inherent in the peer review process and that before seeking disclosure of peer review material the EEOC must conclude that there is a "compelling necessity" for the "specific" information sought.

(4) Quash the subpoena duces tecum served upon the University of Pennsylvania.

(5) Order such other relief, including costs and attorneys' fees, as the Court may deem just and proper.

/s/ [Illegible]

STEVEN B. FEIRSON

BRUCE A. COHEN

(Bar ID #395938)

ALAN D. BERKOWITZ

ROBERT M. CLARK

(Bar ID #366807)

DECHERT PRICE & RHOADS

1730 Pennsylvania Avenue, N.W.

Suite 1100

Washington, D.C. 20006

(202) 626-3300

Attorneys for Plaintiff

The Trustees of the

University of Pennsylvania

Of Counsel:

SHELLEY Z. GREEN

NEIL J. HAMBURG

General Counsel

University of Pennsylvania

110 College Hall

Philadelphia, PA 19104

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Miscellaneous No. 87-0294

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant,

v.

UNIVERSITY OF PENNSYLVANIA,
Respondent.

APPLICATION FOR ORDER TO SHOW CAUSE WHY A
SUBPOENA SHOULD NOT BE ENFORCED

1. This is an action for enforcement of a subpoena *duces tecum*, pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-9 (hereinafter referred to as Title VII).
2. Jurisdiction is conferred upon the Court by Sections 706(f)(3) and 710 of Title VII, 42 U.S.C. §§ 2000e-5(f)(3) and (9).
3. The Applicant, Equal Employment Opportunity Commission (hereinafter referred to as the Commission or EEOC) is the federal agency charged with administration and enforcement of Title VII, including *inter alia*, the investigation of charges of unlawful employment practices.
4. Respondent is a private college located in the State of Pennsylvania and is an employer as defined by Section 701(b) of Title VII and conducts business within the State of Pennsylvania, City of Philadelphia.
5. On September 9, 1986, the Applicant issued and served upon the Respondent a subpoena *duces tecum*,

requiring Respondent to produce evidence needed as part of the Applicant's investigation of a charge of discrimination, which had been filed against the Respondent. The subpoena was issued in conformity with the Applicant's regulations and procedures. (See attached Affidavit of Johnny J. Butler, District Director of the Philadelphia District Office, Equal Employment Opportunity Commission.)

6. On October 10, 1986, Respondent filed with the Applicant a Petition to Modify the subpoena *duces tecum*. The Respondent agreed to provide the Commission with some but not all of the information requested in the subpoena. (See Exhibit 1). (These matters are not in dispute.)
7. On April 10, 1987, the Applicant denied Respondent's Petition for Modification.
8. Respondent has continued to refuse to comply with the subpoena.

WHEREFORE, the Equal Employment Opportunity Commission prays:

- (a) That an order to show cause issue forthwith directing Respondent to appear before this Court on a day certain, to be fixed by said order, and to show cause, if there be any, why an order should not issue directing Respondent to comply with the subpoena;
- (b) That, upon return of said order to show cause, an order issue directing the Respondent to comply with the subpoena; and
- (c) That the Equal Employment Opportunity Commission be granted such further relief as may be necessary and appropriate.

Respectfully submitted,

SPENCER H. LEWIS, JR.
Regional Attorney

ISSIE L. JENKINS
Supervisory Trial Attorney

/s/ YOLONDA R. HUGHES
Trial Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Philadelphia District Office
127 N. 4th Street, Suite 200
Philadelphia, Penna. 19106
Telephone: (215) 597-0881

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Miscellaneous No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant,

v.

UNIVERSITY OF PENNSYLVANIA
Respondent.

COMMONWEALTH OF PENNSYLVANIA) ss.
COUNTY OF PHILADELPHIA)

AFFIDAVIT OF JOHNNY J. BUTLER

I, Johnny J. Butler, being duly sworn on my oath depose and state:

1. I make this Affidavit in support of the Application of the U.S. Equal Employment Opportunity Commission (Commission), for an Order to Show Cause why a subpoena *duces tecum* served by the Commission on the University of Pennsylvania through Neil J. Hamburg in the Office of General Counsel, should not be enforced. (A copy of the subpoena is attached hereto as Exhibit "A").

2. I make this Affidavit on the basis of my own personal knowledge and my review of the Commission's investigative file entitled *Tung v. University of Pennsylvania*, Commission Charge No. 031-854082.

3. I am the District Director of the Commission's Philadelphia District Office. As such, I am one of the

custodians of the Commission's investigative files in the Philadelphia District Office. At all times material to this action, I was one of the officials responsible for the maintenance and custody of all investigative files located in the Commission's Philadelphia District Office.

4. The Philadelphia office is responsible for the investigation of charges alleging that employers, among others, within the judicial district of the Eastern District of Pennsylvania, have committed employment discrimination acts in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. Section 2000e *et seq.* and for enforcement of a subpoena *duces tecum*, issued pursuant to Sections 709 and 710 of Title VII and Section 1601.16 of the Equal Employment Opportunity Commission's Procedural Regulations, 29 C.F.R. Section 1601.16(a) (1973).

5. On July 16, 1985, the Commission's Philadelphia District Office received a charge from Rosalie Tung (Tung) regarding the above named Respondent. (A copy of the charge is attached hereto as Exhibit "B"). In the charge, Ms. Tung alleged that the Respondent discriminated against her because of her sex, female, and her national origin, Chinese-American, by denying her tenure and by sexually harassing her.

6. The Commission assumed jurisdiction over the Tung charge on or about August 9, 1985. (A copy of the referral notice is attached hereto as Exhibit "C").

7. On August 9, 1985, the University of Pennsylvania was served with a copy of Ms. Tung's charge. (A copy of the Notice of the charge is attached hereto as Exhibit "D").

8. The Commission attempted to conduct an investigation of Ms. Tung's charge between August 1985 and September 1986 and received very little cooperation from the Respondent.

9. On September 9, 1986, pursuant to Sections 709 and 710 of Title VII 42 U.S.C. Section 2000e *et seq.* and the Commission's Procedural Regulations 29 C.F.R. Section 1601.16(a), and in furtherance of the investigation, I issued a subpoena *duces tecum* No. EP-86-08 as a result of Respondent's refusal to reply with the data requested by the Commission to complete its investigation of the charge of discrimination against the Respondent (see Exhibit A).

10. In October 1986 the Commission received the Respondent's Petition to Modify the subpoena by removing the request for the tenure review information subpoenaed for the Charging Party and other persons named.

11. On April 10, 1987 the Commission denied the Respondent's request to modify the subpoena and allowed the Respondent 20 days from the receipt of the determination to produce the subpoenaed information. According to the Commission's records, as of the date of this Affidavit, Respondent has not complied with the Commission's subpoena request which was due May 4, 1987.

/s/ [Illegible] for
JOHNNY J. BUTLER
District Director

Sworn to and subscribed before me this 15th day of June 1987

/s/ A. Yvonne Davis
Notary Public

EXHIBIT A

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SUBPOENA

NO. EP-86-08

TO: Neil J. Hamburg
Office of General Counsel/110 College Hall CO
University of Pennsylvania, Philadelphia, PA 19104

IN THE MATTER OF ROSALIE TUNG
v. UNIVERSITY OF PENNSYLVANIA

Charge No. 031-85-4082

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

- ☐ Testify before:
- ☐ Mail the documents described below to:
- ☒ Produce and bring the documents described below to:
- ☐ Produce access to the evidence described below for the purpose of examination or copying to:

Rae Balaban of the Equal Employment Opportunity Commission at 1421 Cherry St., 6th Floor, Phila, PA on 10-20-86 at 10 o'clock on that day.

* The Commission will not pay witness fees or travel expenses for the delivery of required documents to a Commission office unless the box "Testify before" is also checked on the subpoena.

The evidence required is

1. Copies of Charging Party's tenure review file of her Department (Management) and the Personnel Committee.
 2. Copies of the tenure review file for: Balaji Chakravarthy, Jehoshua Eliasburg, David Smittlein, Harry Faulhaber and Barton Weitz.
 3. Identify the names of those individuals who made-up the tenure committees for the Management Department from June 1984 to the present including the tenure status of each and the qualifications of each member to sit on the committee. Identify all members of the Personnel Committee by name and title.
- ☒ (Title VII) This subpoena is issued pursuant to the provision of 42 U.S.C. 2000e-9, 29 U.S.C. 161, and 29 CFR 1601.16.
- ☐ (ADEA) This subpoena is issued pursuant to 29 U.S.C. 626(a) and 209, 15 U.S.C. 49 and 50, and 29 CFR 1626.16.
- ☐ (EPA) This subpoena is issued pursuant to the provisions of 29 U.S.C. 209, 15 U.S.C. 49 and 50, and 29 CFR 1620.20.

(See reverse side for pertinent portions of the Commission's regulations regarding the issuance of subpoenas.)

ISSUING OFFICIAL *(Typed name, title and address)*

Thomas P. Hadfield
District Director (Acting)
EEOC, 127 N. 4th Street
Philadelphia, PA 19102

ON BEHALF OF THE COMMISSION

/s/ Thomas P. Hadfield
THOMAS P. HADFIELD

Date: 9/19/86

EXHIBIT B

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

- ☐ FEPA
☒ EEOC 031854082

Name Rosalie Tung

Street Address 2127-B Arch Street

City, State and Zip Code Phila., Pa. 19103

Named is the employer, labor organization, employment agency, apprenticeship committee, state or local government agency who discriminated against me *(If more than one list below.)*

Name University of Pennsylvania

Street Address 110 College Hall

City, State and Zip Code Phila., Pa. 19104

Cause of discrimination based on *(Check appropriate box(es))*

- ☐ Race ☐ Color ☒ Sex F ☐ Religion
☒ National Origin Chinese-Am ☐ Age
☐ Retaliation ☐ Other *(Specify)*

Date Most Recent or Continuing Discrimination Took Place *(Month, day, year)* April 17, 1985

The Particulars Are *(If additional space is needed, attached extra sheet(s))*:

- I. I was hired by Respondent as an untenured Associate Professor in Sept. 1981. In June

1984, I received a substantial wage increase. In or around September 1984, I was informed that I would be reviewed for tenure. On February 26, 1985, I learned that I was denied tenure. I appealed to the Personnel Committee on March 18, 1985 and on April 16, 1985, the Committee met again to review my case. On April 17, 1985, I was informed that the Committee decided to uphold their previous decision. Furthermore, during my employment, I have been sexually harassed by my Department Chairman, Peter Lorange.

II. Respondent has given me no reason for the denial of tenure or sexual harassment.

III. I believe that I have been discriminated against because of my sex, female, in that:

- a. I was the only female and Chinese American in the group that was reviewed for tenure.
- b. Peter Lorange asked me for references from twenty reviewers outside of the University and ten inside of the University. I do not believe that any other candidate was asked to produce such an extraordinarily high number of reviewers.
- c. After I had received a favorable vote from the faculty (2nd of a four part step in being reviewed for tenure), Peter Lorange submitted a four page letter to the Personnel Committee concerning me. I believe this letter was negative.
- d. However, Peter Lorange and/or the Personnel Committee appeared to be highly supportive of Balaji Chakravarthy (M), Jehoshua Eliashberg (M), David Schmitt-

lein, Gerry Faulhaber (M), and Barton Weitz (M).

- e. I believe that my credentials, performance, publications record, scholarship and teaching skills are equal to or better than B. Chakravarthy, Jehoshua Eliashberg, David Schmittlein, Gerry Faulhaber and Barton Weitz.
- f. Beginning in 1982, Peter Lorange asked me on several occasions to accompany him on business trips and attempted to get into conversations with me of a personal nature about such matters as his relationship with his wife. I believe that my reaction to this, which was to make sure that our relationship stayed strictly professional upset him and is a factor for his present behavior (lack of support) toward me.
- g. I have discovered that the Personnel Committee has attempted to justify its negative vote in my case on the ground that the Wharton School is not interested in China-related research. My field involves much work on international business relations between Eastern and Western countries. I believe this is simply their way of saying they do not want a Chinese-American woman in their school.

☐ I also want this charge filed with the EEOC.

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY—(When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Date /s/ [Illegible]
Charging Party (Signature)

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS
DATE (Day, month, and year)

EXHIBIT B

AMENDED CHARGE OF DISCRIMINATION

This form is effected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

☐ FEPA PHRC #34277

☒ EEOC 031854082

PENNSYLVANIA HUMAN RELATIONS
COMMISSION AND EEOC
(State or local Agency, if any)

Name ROSALIE TUNG

Street Address 2127-B ARCH STREET

City, State and Zip Code PHILADELPHIA, PA 19003

Named is the employer, labor organization, employment agency, apprenticeship committee, state or local government agency who discriminated against me (If more than one list below.)

Name UNIVERSITY OF PENNSYLVANIA

Street Address 110 COLLEGE HALL/CO

City, State and Zip Code PHILADELPHIA, PA 19104

Cause of Discrimination Based on (Check appropriate box(es))

Oriental
☒ Race ☐ Color ☒ Sex F ☐ Religion
☒ National Origin (Chinese American) ☐ Age
☐ Retaliation ☐ Other (Specify)

The Particulars Are (If additional space is needed, attached extra sheet(s)):

- I. I was hired by Respondent as an untenured Associate Professor in September 1981. In June, 1984, I received a substantial wage increase. In or around September of 1984, I was informed that I would be reviewed for tenure. On February 26, 1985, I learned that I was denied tenure. I appealed to the Personnel Committee on March 18, 1985 and on April 16, 1985 the Committee met again to review my case. On April 17, 1985, I was informed that the Committee decided to uphold their previous decision. Furthermore, during my employment, I have been sexually harassed by my Department Chairman, Peter Lorange.
- II. Respondent has given me no reason for the denial of tenure or sexual harassment.
- III. I believe that I have been discriminated against because of my sex, female, my race, Oriental, and my national origin, Chinese American, in that:
 - (a) I was the only female, the only Oriental, and the only Chinese American in the group that was reviewed for tenure.
 - (b) Peter Lorange asked me for references from twenty reviewers outside of the University and ten inside of the University. I do not believe that any other candidate was asked to produce such an extraordinarily high number of reviewers.
 - (c) After I had received a favorable vote from the faculty (2nd of a four part step in being reviewed for tenure), Peter Lorange submitted a four-page letter to

- the Personnel Committee concerning me. I believe this letter was negative.
- (d) However, Peter Lorange and/or the Personnel Committee appeared to be highly supportive of Balaji Chakravarthy (M), Jehoshua Eliasberg (M), David Schmittlein, Gerry Faulhaber (M), and Barton Weitz (M).
 - (e) I believe that my credentials, performance, publications record, scholarship and teaching skills are equal to or better than B. Chakravarthy, Jehoshua Eliasberg, David Schmittlein, Gerry Faulhaber and Barton Weitz.
 - (f) Beginning in 1982, Peter Lorange asked me on several occasions to accompany him on business trips and attempted to get into conversations with me of a personal nature about such matters as his relationship with his wife. I believe that my reaction to this, which was to make sure that our relationship stayed strictly professional, upset him and is a factor for his present behavior (lack of support) toward me.
 - (g) I have discovered that the Personnel Committee has attempted to justify its negative vote in my case on the ground that the Wharton School is not interested in China-related research. My field involves much work on international business relations between Eastern and Western countries. I believe this is simply their way of saying they do not want a Chinese-American, Oriental, woman in their school.

☐ I also want this charged filed with the EEOC.

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY—(When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Date /s/ Rosalie Tung
Charging Party (Signature)

SIGNATURE OF COMPLAINT

SUBSCRIBED AND SWORN TO BEFORE ME THIS
DATE (Day, month, and year)

/s/ Kimberly Ann Britton
Notary Public, Phila., Phila. Co.
My Commission Expires Nov. 24, 1986

I declare under penalty of perjury that the foregoing is true and correct.

Date Dec. 7, 1985

/s/ [Illegible]
Charging Party (signature)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1199

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Plaintiff,

v.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendant.

ORDER

In accordance with the proceedings at the status conference herein of September 3, 1987, and for the reasons set forth upon the record, it is this 3rd day of September, 1987,

ORDERED, that defendant's motion to dismiss is denied, and it is

FURTHER ORDERED, that defendant's motion for a protective order is denied without prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1199

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Plaintiff,

v.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendant.

ORDER

In accordance with the proceedings at the status conference herein of October 5, 1987, and for the reasons set forth upon the record, it is this 5th day of October, 1987,

ORDERED, that defendant's motion to stay further proceedings is denied; and it is

FURTHER ORDERED, that defendant's motion for enlargement of time to answer or raise objections to plaintiff's discovery requests up to and including October 20, 1987 is granted.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

SUPREME COURT OF THE UNITED STATES

No. 88-493

UNIVERSITY OF PENNSYLVANIA,
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ORDER ALLOWING CERTIORARI

Filed December 12, 1988

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted limited to Question 2 presented by the petition.

December 12, 1988

Justice Brennan took no part in the consideration or decision of this petition.

PETITIONER'S BRIEF

No. 88-493

Supreme Court, U.S.

FILED

JAN 26 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

Of Counsel:

SHELLEY Z. GREEN
NEIL J. HAMBURG
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

STEVEN B. FEIRSON
(Counsel of Record)
ALAN D. BERKOWITZ
NANCY J. BREGSTEIN
DECHERT PRICE & RHODS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Petitioner

January 26, 1989

QUESTION PRESENTED

Whether the "first-filed" rule of federal comity, which counsels the stay or dismissal of an action that is duplicative of a previously-filed action in another federal court, is violated when a court retains jurisdiction over the second-filed action not on grounds of sound judicial administration, but because of the court's disapproval of the original plaintiff's choice of forum—even though that choice has been upheld by the first court.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	2
STATEMENT	2
A. The Commission's Policy Regarding Peer Re- view Materials and This Investigation	3
1. The Commission's policy	3
2. The subpoena in this case	4
B. The Two District Court Actions	5
1. The Proceedings	5
2. The District Courts' Decisions	7
(a) The enforcement action	7
(b) The declaratory judgment and injunc- tion action	8
C. The Decision of the Court of Appeals	9
SUMMARY OF ARGUMENT	11
ARGUMENT	15
I. THE COURTS BELOW IMPROPERLY DE- PARTED FROM THE WELL-ESTABLISHED PRESUMPTION IN THE FEDERAL COURTS THAT, IN THE INTEREST OF SOUND JUDICIAL ADMINISTRATION, THE COURT FIRST ACQUIRING JURISDICTION OVER A MATTER SHOULD DECIDE IT.....	15
A. The Strong Policy Against Duplicative Liti- gation Mandates Deference To The First- Filed Action	15
B. Departing From The First-Filed Rule In This Case Violated Principles Of Sound Ju- dicial Administration	17

TABLE OF CONTENTS—Continued

	Page
1. Conservation of Judicial Resources and Comprehensive Disposition of Litigation..	18
2. Avoidance of Inconsistent Results	20
C. The Disapproval Of The Courts Below Of The University's Choice of Forum Did Not Justify A Departure From The First-Filed Rule	21
1. A Litigant's Choice of an Otherwise Appropriate Forum With Applicable Precedent in Mind Is Neither Objectionable Nor a Valid Reason For Allowing a Duplicative Action to Proceed	23
(a) A litigant's motive is irrelevant to considerations of sound judicial administration	23
(b) The District of Columbia was a proper forum for the University's claims	26
(c) The choice of an otherwise appropriate forum with applicable precedent in mind is not objectionable	27
(d) The Commission had no entitlement to the Third Circuit's interpretation of federal law	29
2. The University's Action Was Not Preemptive	31
3. The Court of Appeals' Reasons Have Nothing To Do With Sound Judicial Administration, Which Was Ill-Served in This Case	35
II. THE DECISION AS TO WHICH COURT WILL DECIDE THE ACTION SHOULD BE MADE BY THE COURT FIRST POSSESSED OF JURISDICTION	36
CONCLUSION	40
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
<i>Ackert v. Ausman</i> , 198 F. Supp. 533 (S.D.N.Y. 1961)	30
<i>Acton Corp. v. Borden, Inc.</i> , 670 F.2d 377 (1st Cir. 1982)	16
<i>Aloha Leasing v. Craig Germain Co.</i> , 644 F. Supp. 561 (N.D.N.Y. 1986)	37
<i>Amerada Petroleum Corp. v. Marshall</i> , 381 F.2d 661 (5th Cir. 1967), <i>cert. denied</i> , 389 U.S. 1039 (1968)	35
<i>Barber Greene Co. v. Blaw-Knox Co.</i> , 239 F.2d 774 (6th Cir. 1957)	17
<i>Bergman v. Bowling Green State University</i> , 820 F.2d 1224 (6th Cir. 1987)	29
<i>Brierwood Shoe Corp. v. Sears, Roebuck & Co.</i> , 479 F. Supp. 563 (S.D.N.Y. 1979)	35
<i>Carbide & Carbon Chemicals Corp. v. U.S. Industrial Chemicals</i> , 140 F.2d 47 (4th Cir. 1944)	17
<i>Clayton v. Warlick</i> , 232 F.2d 699 (4th Cir. 1956)	30
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	15, 35
<i>Columbia Pictures Industries, Inc. v. Schneider</i> , 435 F. Supp. 742 (S.D.N.Y. 1977)	29, 35
<i>Columbia Oil & Gas Corp. v. SEC</i> , 134 F.2d 265 (3d Cir. 1943)	39
<i>Compagnie de Bauxites De Guinea v. INA</i> , 651 F.2d 877 (3d Cir. 1981), <i>aff'd</i> , 456 U.S. 694 (1982)	17
<i>Creighton Omaha Regional Health Care Corp. v. Lomas & Nettleton Co.</i> , 486 F. Supp. 392 (D. Neb. 1980)	35
<i>Crosley Corp. v. Hazeltine Corp.</i> , 122 F.2d 925 (3d Cir. 1941), <i>cert. denied</i> , 315 U.S. 813 (1942)	9, 15, 16
<i>Cunningham Bros. v. Bail</i> , 407 F.2d 1165 (7th Cir.), <i>cert. denied</i> , 395 U.S. 959 (1969)	32
<i>Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County</i> , 542 F. Supp. 1317 (S.D.N.Y. 1982)	37

TABLE OF AUTHORITIES—Continued

	Page
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), <i>cert. denied</i> , 476 U.S. 1163 (1986)	<i>passim</i>
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	3, 29
<i>Factors Etc., Inc. v. Pro Arts, Inc.</i> , 579 F.2d 215 (2d Cir. 1978), <i>cert. denied</i> , 440 U.S. 908 (1979)	19, 35
<i>Formflex Foundations, Inc. v. Cupid Foundations, Inc.</i> , 383 F. Supp. 497 (S.D.N.Y. 1974)	37, 38
<i>Fort Howard Paper Co. v. William D. Witter, Inc.</i> , 787 F.2d 784 (2d Cir. 1986)	16
<i>Garrett v. City of San Francisco</i> , 818 F.2d 1515 (9th Cir. 1987)	22
<i>Gemco Latinoamerica, Inc. v. Seiko Time Corp.</i> , 623 F. Supp. 912 (D.P.R. 1985)	37
<i>General Electric Co. v. FTC</i> , 411 F. Supp. 1004 (N.D.N.Y. 1976)	31
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	3, 29
<i>Great Northern Ry. Co. v. National Railroad Adjustment Board</i> , 422 F.2d 1187 (7th Cir. 1970) ..	15, 20
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947)	18
<i>H.L. Green Co. v. MacMahon</i> , 312 F.2d 650 (2d Cir. 1962), <i>cert. denied</i> , 372 U.S. 928 (1963) ..	30
<i>Hanes Corp. v. Millard</i> , 531 F.2d 585 (D.C. Cir. 1976)	32
<i>Hospah Coal Co. v. Chaco Energy Co.</i> , 673 F.2d 1161 (10th Cir. 1982)	17, 37, 38
<i>Independent Tape Merchant's Ass'n v. Creamer</i> , 346 F. Supp. 456 (M.D. Pa. 1972)	31
<i>Kelberine v. Societe Internationale</i> , 363 F.2d 989 (D.C. Cir. 1966), <i>cert. denied</i> , 385 U.S. 989 (1966)	22
<i>Kerotest Manufacturing Co. v. Co-O-Two Fire Equipment Co.</i> , 342 U.S. 180 (1952)	<i>passim</i>
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir.), <i>cert. denied</i> , 434 U.S. 904 (1977)	29

TABLE OF AUTHORITIES—Continued

	Page
<i>Liquor Salesmen's Union v. NLRB</i> , 664 F.2d 1200 (D.C. Cir. 1981)	39
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337 (9th Cir. 1981)	29
<i>Mann Mfg., Inc. v. Hortex, Inc.</i> , 439 F.2d 403 (5th Cir. 1971)	37
<i>Martin v. Graybar Electric Co.</i> , 266 F.2d 202 (7th Cir. 1959)	17
<i>Mattel, Inc. v. Louis Marx & Co.</i> , 353 F.2d 421 (2d Cir. 1965), <i>cert. denied</i> , 384 U.S. 948 (1966)	17
<i>Merrill Lynch, Pierce, Fenner & Smith v. Haydu</i> , 675 F.2d 1169 (11th Cir. 1982)	17
<i>Orthmann v. Apple River Campground</i> , 765 F.2d 119 (8th Cir. 1985)	17
<i>Pacesetter Systems, Inc. v. Medtronic, Inc.</i> , 678 F.2d 93 (9th Cir. 1982)	17, 37
<i>Patty Precision v. Browne & Sharpe Mfg. Co.</i> , 742 F.2d 1260 (10th Cir. 1984)	22
<i>Piper Aircraft v. Reyno</i> , 454 U.S. 235 (1981) ..	24, 25, 28
<i>Polaroid Corp. v. Casselman</i> , 213 F. Supp. 379 (S.D.N.Y. 1962)	35
<i>Public Service Comm'n v. Wycoff</i> , 344 U.S. 237 (1952)	32
<i>Smith v. McIver</i> , 9 Wheat. (22 U.S.) 532 (1822) ..	16
<i>Southern Construction Co. v. Pickard</i> , 371 U.S. 57 (1962)	24
<i>Sundstrand Corp. v. American Brake Shoe Co.</i> , 315 F.2d 273 (7th Cir. 1963)	37, 38
<i>SW Indus., Inc. v. Aetna Cas. & Surety Co.</i> , 653 F. Supp. 631 (D.R.I. 1987)	37
<i>Tempco Electric Heater Corp. v. Omega Engineering</i> , 819 F.2d 746 (7th Cir. 1987)	31
<i>The Abidin Daver</i> , [1984] 2 W.L.R. 196	16
<i>United States v. Cincinnatti Transit, Inc.</i> , 337 F. Supp. 1068 (S.D. Ohio 1972)	31
<i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1964)	28
<i>Ven-Fuel, Inc. v. Department of the Treasury</i> , 673 F.2d 1194 (11th Cir. 1982)	34

TABLE OF AUTHORITIES—Continued

Page

<i>Washington Metropolitan Area Transit Authority v. Ragonese</i> , 617 F.2d 828 (D.C. Cir. 1980)	17
<i>West Gulf Maritime Ass'n v. ILA Deep Sea Local 24</i> , 751 F.2d 721 (5th Cir.), <i>cert. denied</i> , 474 U.S. 844 (1985)	17
<i>William Gluckin & Co. v. International Playtex Corp.</i> , 407 F.2d 177 (2d Cir. 1969)	28
<i>Yoder v. Heinold Commodities, Inc.</i> , 630 F. Supp. 756 (E.D. Va. 1986)	35

Constitutional Provisions, Statutes, and Rules:

U.S. Const., Amend. I	<i>passim</i>
Amend. V	<i>passim</i>

Administrative Procedure Act, 5 U.S.C. § 551 <i>et seq.</i>	<i>passim</i>
---	---------------

Declaratory Judgment Act, 28 U.S.C. § 2201	<i>passim</i>
--	---------------

28 U.S.C. § 1254	1
§ 1391	26, 27
§ 1404	<i>passim</i>
§ 1407	39
§ 2112(a)	14, 38, 39

Federal Rules of Civil Procedure:

Rule 1	39
Rule 8	39
Rule 12	39
Rule 13	24
Rule 42	39

Legislative Materials:

Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744	27
S. Rep. No. 1992, 87th Cong., 2d Sess. (1962)	27

TABLE OF AUTHORITIES—Continued

Other Authorities:

Page

E. Borchard, <i>Declaratory Judgments</i> (2d ed. 1941)	34
C. Wright & A. Miller, <i>Federal Practice & Procedure</i>	26, 28, 34
Borchard, <i>The Federal Declaratory Judgments Act</i> , 21 Va. L. Rev. (1934)	32
<i>The Supreme Court, 1951 Term</i> , 66 Harv. L. Rev. 89 (1953)	37
EEOC Compliance Manual	3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 to A-27) is reported at 850 F.2d 969 (3d Cir. 1988). A petition for rehearing was denied in an unreported order (Pet. App. A-28). The orders of the District Court (Pet. App. A-34 to A-35) are unreported. The Equal Employment Opportunity Commission's determination not to modify its subpoena (Pet. App. A-29 to A-33) also is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1988. A timely petition for rehearing was denied on August 11, 1988. Pet. App. A-28. The petition for certiorari was filed on September 19, 1988, and was granted on December 12, 1988 (J.A. 33). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved and are set forth in an appendix to this brief: The First and Fifth Amendments to the United States Constitution; relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(a); 29 U.S.C. § 161(2); the Declaratory Judgment Act, 28 U.S.C. § 2201(a); and 28 U.S.C. §§ 1391(e) and 1404(a).

STATEMENT

This case grows out of an ongoing dispute between the Equal Employment Opportunity Commission ("EEOC" or "Commission") and the University of Pennsylvania ("the University"), concerning the Commission's policy of mechanically requiring the disclosure of confidential written evaluations of tenure candidates by the candidate's academic peers—so-called "peer review" materials.

This particular case is but one of two pending cases between the University and the Commission involving the Commission's policy. While the principal focus of the case under review is on the enforceability of a particular subpoena demanding the production of certain peer review materials, the other case—which was filed first and still is pending in the United States District Court for the District of Columbia—involves the University's challenge under the Constitution and the Administrative Procedure Act to the Commission's general policy. That other action also seeks to enjoin the particular ap-

plication of the Commission's policy to the University through the subpoena at issue here. See 850 F.2d at 971 (Pet. App. A-3).

The question now before the Court is whether the instant action should have been stayed or dismissed out of deference to the University's previously-filed and more comprehensive action in the District of Columbia federal court.

A. The Commission's Policy Regarding Peer Review Materials and This Investigation

1. *The Commission's policy.* In connection with its investigations of charges of employment discrimination against institutions of higher learning, the EEOC has followed a practice of demanding the wholesale disclosure of the charging party's (and others') tenure review files, including confidential peer review materials. The Commission's position is that a university's interest in maintaining the confidentiality of such materials, in order to preserve the integrity of the tenure process, is not entitled to any consideration.¹

¹ The Commission has argued consistently against a balancing approach or qualified privilege. See, e.g., *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986); *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983); *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982) (as amicus). The Commission's peer review disclosure rule is embodied in Section 24.4 of the EEOC Compliance Manual, which provides that the "EEOC may obtain any evidence that is relevant and necessary to the resolution of any issue in an investigation, unless it would be unduly burdensome to provide the evidence." C.A. App. 131. Pursuant to this direction, § 629 of the Commission's Document Assembly System ("DAS"), used to create requests for information in investigating charges, instructs Commission employees to demand information necessarily containing peer review materials. In the proceedings below, the Commission expressly stated that, notwithstanding the interest of a university in preserving the integrity of the tenure process, the Commission treats institution of higher learning no differently than other subjects of its investigations, C.A. App. 99-

2. *The subpoena in this case.* The Commission issued the subpoena in this case in connection with an investigation of charges filed by an unsuccessful tenure candidate at the University's Wharton School. The candidate, Rosalie Tung, filed charges with the Commission alleging discrimination based on race, sex, and national origin (Chinese-American). J.A. 27-28. The University cooperated with the Commission's investigation of Tung's charge and "supplied a wide range of documents, but declined to release confidential peer review materials relating to the tenure process for Tung" and five unrelated male faculty members. 850 F.2d at 972 (Pet. App. A-5).² The University took the position that the disclosure of these confidential peer review materials would undermine the integrity of the tenure process—by which the University decides, for the foreseeable future, who will teach, what will be taught, and what research will be done—and consequently would infringe the University's First Amendment right to academic freedom. C.A. App. 5.

In September, 1986, the Commission issued a subpoena duces tecum demanding the production of the requested peer review materials. J.A. 21-22. On October 10, the University petitioned the Commission to modify its subpoena by balancing the Commission's need for access to investigative materials against the "important societal and constitutional interests in preserving the integrity of the peer review process." 850 F.2d at 972 (Pet. App. A-5). The national headquarters of the EEOC denied the University's petition on April 10, 1987 (Pet. App.

102, 109-111, such as "supermarkets" and "warehouses." *Id.* at 100-101.

² The Court of Appeals stated that the five male faculty members also were "under consideration" for tenure. 850 F.2d at 972 (Pet. App. A-5). Actually, one of the men was not an internal candidate for tenure at all; three others were candidates for tenure in a separate Department of the Wharton School, and one of those was considered in a different academic year. C.A. App. 8.

A-29 to A-33), relying on its consistent policy, and "requested" a response to the subpoena "within twenty days . . . to avoid enforcement proceedings." *Id.* A-33.

B. The Two District Court Actions

1. The Proceedings

In view of the substantial chilling effect occasioned by the Commission's policy on disclosure of peer review materials, and the harm caused to First Amendment interests by the Commission's repeated application of its enforcement policy, see J.A. 8-10,³ the University, after exhausting its administrative remedies, filed an action in the United States District Court for the District of Columbia on May 1, 1987 (No. 87-1199). J.A. 4-14. The University sought a declaratory judgment and injunctive relief based on the unconstitutionality of the Commission's policy under the First Amendment (Count I) and the Due Process Clause of the Fifth Amendment (Count II), as well as its unlawfulness under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553, 701 *et seq.* (Count III).⁴ Finally, in Count IV of its

³ The consensus of university administrators and faculty alike as to the harm caused by the Commission's policy is set forth in the *amicus* briefs filed in support of the petition for certiorari in this case. See Brief of the American Association of University Professors, *Amicus Curiae*, in Support of the Petition; Brief of Princeton University, Brown University, Stanford University, Harvard University, and Yale University, as *Amicus Curiae*, in Support of the Petition.

Even as to the University itself, the effect of the Commission's policy is ongoing. On September 28, 1988, the Commission issued another subpoena for peer review materials in connection with an investigation of charges filed against the University by another unsuccessful tenure candidate. See Subpoena No. PA-88-023C, issued in *Matter of Ellen Pollack v. University of Pennsylvania* (Charge No. 170872742).

⁴ The University alleged (1) that the Commission had engaged in rulemaking without complying with the notice and comment requirements of the APA, 5 U.S.C. § 553, and (2) that the Com-

complaint, the University asked the court to quash the subpoena issued in connection with the *Tung* investigation. J.A. 12-13. See also 850 F.2d at 972 (Pet. App. A-6).

The Commission did not answer the University's complaint within the time allowed. Instead, on June 19, 1987, the Commission filed a separate action in the United States District Court for the Eastern District of Pennsylvania, seeking enforcement of the very same subpoena that was the subject of Count IV of the District of Columbia action. J.A. 15-17. The Commission's action was significantly narrower than the District of Columbia action: It concerned only the *Tung* subpoena and not any of the other issues raised by the University's complaint, such as the existence of the Commission's rule, the procedures employed in its formulation, the frequency and nature of its application, and its impact on the First Amendment rights of faculty members and educational institutions. Indeed, the Commission took the position that the only consideration on its application for enforcement was whether the information subpoenaed was relevant to its investigation, and that the University could not make any constitutional or APA arguments as defenses to enforcement of the subpoena. See 850 F.2d at 973 (Pet. App. A-7); C.A. App. 102-03.

On June 29, the University moved to dismiss the Commission's suit, on grounds of federal comity, in favor of the previously filed and more comprehensive action in the District of Columbia. The University also stated its intention, in the event the action was not dismissed, to raise its constitutional and APA arguments as defenses to enforcement of the subpoena, and to seek dis-

mission's policy was arbitrary and capricious, contrary to law, and contrary to the constitutional rights of the University and others similarly situated, in violation of 5 U.S.C. § 701 *et seq.* J.A. 11-12.

covery on those issues. 850 F.2d at 973 (Pet. App. A-7).⁵

The day after the University moved to dismiss the Commission's enforcement action, the Commission moved to dismiss the University's action for declaratory and injunctive relief, on grounds of improper venue; lack of subject matter jurisdiction; and failure to state a claim, on the ground that, as a pre-enforcement action, the case was not ripe for review. C.A. Supp. App. 217-35; 277-86.

2. *The District Courts' Decisions*

The two district courts issued decisions on the respective motions to dismiss within days of each other. Each court retained jurisdiction of the case before it.

(a) *The enforcement action.* On September 1, 1987, the District Court for the Eastern District of Pennsylvania (Hannum, J.) issued two orders without opinions. In one order, the court denied the University any discovery, on the ground urged by the Commission that the University's constitutional and APA defenses "are an improper response to an application to enforce an administrative subpoena." Pet. App. A-34.⁶ In a separate

⁵ In support of its defenses, the University intended to submit affidavits from college and university presidents, deans, and professors attesting to the vital importance of confidentiality in the peer review process; and the University sought discovery about the EEOC's policy and practices concerning peer review materials. C.A. App. 71, 77-87.

⁶ Consequently, the University was precluded from submitting affidavits attesting to the critical importance of confidentiality to the peer review process and the adverse consequences of a routine disclosure requirement.

By contrast, the University submitted in its District of Columbia action affidavits of John Brademas, President of New York University; John P. Fackler, Dean of Texas A & M University; Ronald E. Frank, Dean of the School of Management, Purdue University;

two-sentence order, the District Court proceeded directly to the merits of the enforcement issue, without first ruling on the University's motion to dismiss, and ordered the University to produce the subpoenaed documents. Only after deciding the merits did the court address the preliminary issue of comity, denying the University's motion to dismiss as "moot." Pet. App. A-35.⁷

(b) *The declaratory judgment and injunction action.* After full briefing and argument, the District Court for the District of Columbia (Jackson, J.) denied the Commission's motion to dismiss on September 3, 1987. The court thus rejected the Commission's arguments that jurisdiction and venue were improper and that the University failed to state ripe claims under the First and Fifth Amendments and the Administrative Procedure Act. J.A. 31; see 850 F.2d at 974 (Pet. App. A-8).

On September 30, 1987—after the decision of the District Court in the enforcement action—the Commission

James O. Freedman, President of Dartmouth College; Sheldon Hackney, President of the University of Pennsylvania; Aaron Lemonick, Dean of the Faculty of Princeton University; Paul J. Mishkin, Professor of Law, University of California at Berkeley; Harry C. Payne, Provost and Acting President of Haverford College; Clinton A. Phillips, Dean of Faculties and Associate Provost of Texas A & M University; William P. Pierskalla, Deputy Dean for Academic Affairs at the Wharton School, University of Pennsylvania; James N. Rosse, Vice President and Provost of Stanford University; Robert B. Stevens, Chancellor of the University of California at Santa Cruz; and Mayer N. Zald, Professor of Sociology and Social Work at the University of Michigan. Attachments to Memorandum in Support of Plaintiff's Motion for Summary Judgment, *University of Pennsylvania v. EEOC*, No. 87-1199 (D.D.C., filed June 30, 1988).

⁷ The District Court refused to stay its order pending appeal, but a stay was entered by the Court of Appeals for the Third Circuit on October 16, 1987. 850 F.2d at 974 n.2 (Pet. App. A-8).

moved for a stay of the District of Columbia action pending decision of the University's appeal to the Third Circuit. Judge Jackson denied that motion on October 5, 1987. J.A. 32; see 850 F.2d at 974 (Pet. App. A-8). The Commission did not move at any time during the pendency of the enforcement action to have the District of Columbia action transferred to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). *Id.* The Commission belatedly filed a transfer motion on July 15, 1988, which Judge Jackson denied from the bench on October 11, 1988. In the meantime, the District of Columbia action proceeded apace: discovery was completed, and cross-motions for summary judgment were filed. Those motions are now awaiting oral argument and decision.

C. The Decision of the Court of Appeals

The Court of Appeals affirmed the Eastern District's refusal to stay or dismiss the enforcement action in favor of the first-filed suit for declaratory and injunctive relief. Preliminarily, the court acknowledged the vitality of the "first-filed rule," which dictates that "[i]n all cases of federal concurrent jurisdiction, the court which first has possession of the subject must decide it." *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941). See 850 F.2d at 971 (Pet. App. A-2). It also acknowledged that "this policy of comity has served to counsel trial judges to exercise their discretion by enjoining the subsequent prosecution of 'similar cases . . . in different federal district courts.'" *Id.* (citations omitted). Finally, the court recognized that the procedural posture of this case "could lead to the anomalous result of the District of Columbia judge declaring the EEOC subpoena policy unconstitutional or unenforceable, but this court nevertheless ordering it to comply with the Eastern District of Pennsylvania judge's order enforcing the subpoena," and that, indeed,

"this is the type of situation that prompted the first-filed rule." 850 F.2d at 974 (Pet. App. A-8 to A-9).

Nevertheless, the court held that the District Court's retention of jurisdiction in this case was proper in view of the existence of precedent in the Third Circuit favorable to the Commission's position on enforcement of the subpoena. See *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).⁸ It was the view of the Court of Appeals that the University "instituted suit in one forum in anticipation of the opposing party's imminent suit in another, less favorable, forum." 850 F.2d at 976 (Pet. App. A-15). The Court of Appeals concluded that the first-filed rule "should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action." *Id.* at 978 (Pet. App. A-18). The Court of Appeals also rejected the University's arguments that reversal was required on account of the District Court's improper decision of the merits of the enforcement issue in advance of the threshold motion to dismiss, and because of the District Court's failure to state any reasons for its decision. *Id.* at 977 n.5 (Pet. App. A-16).

Because the Court of Appeals viewed the subpoena enforcement issue as "essentially the same" as that

⁸ In *Franklin & Marshall*, a divided panel of the Third Circuit refused to apply either a qualified privilege or a balancing approach in connection with EEOC subpoenas of faculty peer review materials. In spite of its recognition that confidentiality plays an important role in the tenure review process and that that process is a critical component of a university's activities which are protected by the First Amendment, 775 F.2d at 114 (Pet. App. A-44 to A-45), the *Franklin & Marshall* court gave no weight at all to the First Amendment interests at stake. *Id.* at 114-15 (Pet. App. A-45 to A-47). Thus, the court refused to consider any approach short of requiring complete disclosure of any arguably relevant materials—with relevance defined so broadly as to constitute no real limit on the Commission's investigatory authority. See *id.* at 111, 117 (Pet. App. A-39, A-51).

raised in *Franklin & Marshall*, it affirmed enforcement of the subpoena. 850 F.2d at 980 (Pet. App. A-22). The court also rejected the University's separate argument that the subpoena was unenforceable because it was issued pursuant to an unlawful rule, stating that "[e]ven if the University were permitted to raise its APA defense, and establish that the EEOC rule was invalid, the University has not established how the EEOC could be prevented from enforcing a particular subpoena." *Id.* at 981 (Pet. App. A-25). The Court of Appeals denied rehearing on August 11, 1988. Pet. App. A-28.

This Court granted certiorari on December 12, 1988, limited to the question presented concerning the first-filed rule of federal comity. J.A. 33.

SUMMARY OF ARGUMENT

I.A. This case presents an opportunity for the Court to endorse and clarify the long-standing first-filed rule of federal comity. That rule counsels district judges to stay or dismiss an action that raises substantially the same issues as a previously filed action between the same parties. The rule fosters sound judicial administration by preventing duplicative litigation—thereby conserving judicial resources, avoiding inconsistent results, and fostering the comprehensive position of litigation. See *Kero-test Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952). Departure from the first-filed rule is justified only when necessary to serve those same interests.

B. The Court below ignored the interests of sound judicial administration in permitting this duplicative action to proceed simultaneously with the first-filed action in the District of Columbia. The District of Columbia action is a broad challenge, based on the First Amend-

ment, the Due Process Clause, and the Administrative Procedure Act, to the Commission's peer review disclosure policy and practice. It is far more comprehensive than the later-filed, one-issue subpoena enforcement action brought by the Commission. The action filed by the University presents questions that would have required decision even if the subpoena in question had never been issued. The proof of this proposition is that the bulk of the District of Columbia action is moving forward in spite of the decision below enforcing the Commission's subpoena.

Thus, the Commission's enforcement action could not and did not resolve the whole of the dispute between the University and the Commission. The refusal of the courts below to give "due regard to conservation of judicial resources and comprehensive disposition of litigation," *Kerotest*, 342 U.S. at 183, by deferring to the first-filed and more comprehensive action, guaranteed that there would be piecemeal litigation and the waste of scarce judicial resources. In addition, by permitting duplicative actions, the decision below created a substantial potential for directly conflicting judgments of co-equal courts on important questions of federal statutory and constitutional law.

C. The Court of Appeals sought to justify the waste and potential for conflict that inevitably would flow from its decision on the ground that the first-filed rule "should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action." 850 F.2d at 978 (Pet. App. A-18). That justification is unsound. It focuses on the motive of the parties, rather than on what would serve the overall efficient administration of justice. It intimates that filing suit in the District of Columbia was somehow improper when, in fact, the District of Colum-

bia court found the action to have been properly filed and the forum convenient; thus, the District of Columbia court rejected the Commission's motion to dismiss on grounds of jurisdiction, venue, and ripeness, and denied the Commission's motion, pursuant to 28 U.S.C. § 1404(a), to transfer the case to the Eastern District of Pennsylvania. The rationale of the Court of Appeals also suggests that it is improper for counsel to consider relevant precedent in each legitimate forum offered by the venue statutes when deciding where to initiate a declaratory judgment action, even though such considerations are a natural consequence of the choices offered by statute and play a role in diligently representing a client's interests. It assumes, incorrectly, that the Commission is entitled to the Third Circuit's interpretation of the Constitution, as "local law," rather than the interpretation of other co-equal federal courts. And it mischaracterizes the University's action in the District of Columbia as simply "preemptive" of the subpoena enforcement action when, in fact, the University's action presents a decision a far more important, broad-ranging, and long-standing dispute than the one over a single subpoena served on a lone academic institution.

In essence, the Court of Appeals sacrificed the principles of sound judicial administration to the following two propositions: (1) plaintiffs should passively submit to a policy that results in repeated violations of their constitutional and statutory rights rather than seek protection through a comprehensive resolution of the problem; and (2) plaintiffs, to avoid being branded as "forum-shoppers," should refrain from filing an action in an appropriate forum where the law is favorable, but instead must submit to a less appropriate forum where they have the least chance of success. This cannot be the law.

II. A separate component of the issue of which court should entertain the merits of an action is the question of which court, as a preliminary matter, should make that determination. To guard against duplicative litigation, a clear rule is warranted requiring that such a determination be made by the court that first acquires jurisdiction over a matter. Such a rule has been applied with increasing frequency by the lower courts, and such a rule applies by statute to multiple appeals to the Courts of Appeals from administrative orders. 28 U.S.C. § 2112(a). Thus, if a defendant believes that a plaintiff's choice of forum is inappropriate, it can seek to have the first-filed action dismissed or transferred. Claims such as improper venue, bad faith, anticipatory filing, inconvenience, or other considerations relevant to the interests of justice, can all be made in the first court in a motion to dismiss or transfer pursuant to 28 U.S.C. § 1404(a). Such a mandated procedure guarantees the presentation of claims in an orderly and comprehensive fashion and a disposition without inefficiency or conflict. The failure of the courts below to adhere to this accepted procedure created the duplicative litigation in this case.

ARGUMENT

I. THE COURTS BELOW IMPROPERLY DEPARTED FROM THE WELL-ESTABLISHED PRESUMPTION IN THE FEDERAL COURTS THAT, IN THE INTEREST OF SOUND JUDICIAL ADMINISTRATION, THE COURT FIRST ACQUIRING JURISDICTION OVER A MATTER SHOULD DECIDE IT.

A. The Strong Policy Against Duplicative Litigation Mandates Deference To The First-Filed Action.

The first-filed rule is a well-settled presumption in the federal courts which counsels the district courts to stay or dismiss an action that is duplicative of a previously filed action in another federal court.⁹ The rule is based on the strong policy against duplicative litigation, and has as its purpose "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" *Kero-test Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). "The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results." *Great Northern Ry. Co. v. National Railroad Adjustment Board*, 422 F.2d 1187, 1193 (7th Cir. 1970). See also *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d at 930.¹⁰

⁹ This case concerns only duplicative actions in the federal courts. Different considerations may come into play when duplicative actions are pending in state and federal courts. See generally *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

¹⁰ The first-filed rule was firmly part of the common law of England at the time the United States government was established. As the Third Circuit noted in *Crosley*, "the English Court of Chancery at the beginning of the Nineteenth Century exercised unquestioned power to enjoin parties from proceeding elsewhere, either at law or in equity, once it had obtained jurisdiction of a

The first-filed rule has found widespread acceptance in the lower federal courts as an effective means of discouraging and dealing with duplicative litigation, which imposes burdens on the federal courts without any redeeming benefits. In *Crosley*—one of the first cases to invoke the first-filed rule—the Court of Appeals for the Third Circuit ordered the district court to enjoin a second-filed suit, heeding Chief Justice Marshall's injunction that in "cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." 122 F.2d at 929 (quoting *Smith v. McIver*, 9 Wheat. (22 U.S.) 532, 535 (1822)). The Third Circuit elaborated on the rationale of the first-filed rule:

It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. . . . The party who first brings a controversy into a court of competent jurisdiction for adjudication should . . . be free from the vexation of subsequent litigation over the same subject matter. The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. 122 F.2d at 930.

All of the Circuits have shown a similar respect for the first-filed rule and its underlying rationale.¹¹ They have

cause." 122 F.2d at 927; see *id.* at 927-28 (citing cases and treatises). More recently, the English courts have applied the first-filed principle even in cases involving previously filed actions in foreign courts, to prevent a defendant in a foreign suit from "institut[ing] as plaintiff an action in England about the same matter . . ." *The Abidin Daver*, [1984] 2 W.L.R. 196, 203 (opinion of Lord Diplock).

¹¹ See, e.g., *Acton Corp. v. Borden, Inc.*, 670 F.2d 377 (1st Cir. 1982) (affirming stay of second-filed action); *Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 790 (2d Cir. 1986) ("where there are two competing lawsuits, 'the first suit should

agreed that only the first of two duplicative actions should be permitted to go forward, unless to do so would undermine, rather than serve, sound judicial administration."¹²

B. Departing From The First-Filed Rule In This Case Violated Principles of Sound Judicial Administration.

In its decision below, the Third Circuit did not question—and indeed endorsed—the soundness and vitality

have priority'") (citations omitted); *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 423 (2d Cir. 1965) ("it has long been held in this Circuit that as a principle of sound judicial administration, the first suit should have priority"); *Compagnie de Bauxites De Guinea v. INA*, 651 F.2d 877, 887 n.10 (3d Cir. 1981) (reaffirming commitment to first-filed rule); *Carbide & Carbon Chemicals Corp. v. U.S. Industrial Chemicals*, 140 F.2d 47 (4th Cir. 1944) (upholding dismissal of second-filed action); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 (5th Cir. 1985) (first-filed rule serves "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result"); *Barber Greene Co. v. Blaw-Knox Co.*, 239 F.2d 774, 778 (6th Cir. 1957) (recognizing and applying first-filed rule); *Martin v. Graybar Electric Co.*, 266 F.2d 202, 204 (7th Cir. 1959) (except in "unusual circumstances . . . the party filing later in time should be enjoined from further prosecution of his suit"); *Orthmann v. Apple River Campground*, 765 F.2d 119, 121 (8th Cir. 1985) (endorsing rule but departing from it on basis of judicial efficiency); *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982) (noting that "[t]he 'first to file' rule normally serves the purpose of promoting efficiency well and should not be disregarded lightly"); *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161 (10th Cir. 1982); *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982); *Washington Metropolitan Area Transit Authority v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980).

¹² See, e.g., *Orthmann v. Apple River Campground*, 765 F.2d at 121 (rule "should be applied in a manner serving sound judicial administration"); *Pacesetter Systems*, 678 F.2d at 95 (rule "is to be applied with a view to the dictates of sound judicial administration").

of the first-filed rule as a general principle. It determined, however, that the rule should be disregarded in this case, on account of its views that "at least one of the [University's] motives [was] to circumvent local law and preempt an imminent subpoena enforcement action." 850 F.2d at 978 (Pet. App. A-18). This reason for departing from the first-filed rule is flawed, however, in its characterization of the University's actions, its inconsistency with previous decisions of the lower federal courts (including the Third Circuit), and, most importantly, its disregard for the policies served by the first-filed rule.

While the district courts may have discretion to make exceptions to the first-filed rule, those exceptions have been and should be based solely on the policy of the rule to foster sound judicial administration, not on a court's disapproval of a litigant's strategy, or on its interest in deciding a case, or on possible favoritism toward one of the parties—either intrinsically or because the party chose that court. Exceptions to the first-filed rule have been and should be recognized only when a mechanical application of the rule would not serve the rule's basic purposes of conserving judicial resources, avoiding inconsistent results, and facilitating the comprehensive disposition of litigation.¹³ When a proffered exception to the rule is irrelevant to or inconsistent with sound judicial administration, as it was in this case, it should be rejected, and the first-filed rule should be followed.

1. Conservation of Judicial Resources and Comprehensive Disposition of Litigation

In *Kerotest*, this Court placed principal emphasis on "giving regard to conservation of judicial resources and comprehensive disposition of litigation" 342 U.S.

¹³ Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (enumerating factors to be considered in a court's exercise of discretion on a motion to dismiss for *forum non conveniens*).

at 183. There the Court affirmed the Third Circuit's ruling in favor of a first-filed action in which all parties to the dispute could be joined. The Court quoted approvingly from the Third Circuit's opinion that "the whole of the war and all the parties to it are in the Chicago theatre and there only can it be fought to a finish On the other hand if the battle is waged in the Delaware arena there is a strong probability that the Chicago suit nonetheless would have to be proceeded with," since one of the parties could not be joined in the Delaware action. 342 U.S. at 183 (citation omitted). The Court agreed with the Third Circuit's assessment that there was "no adequate reason" to have "two litigations where one will suffice[.]" *Id.*¹⁴

In this case, however, the "whole of the war" is in the District of Columbia court, and only there "can it be fought to a finish." The subpoena enforcement action in the Eastern District of Pennsylvania involved only the *Tung* subpoena. Indeed, the Commission took the position—and the District Court held—that the University could not even assert in defense that the subpoena was unlawful under the First and Fifth Amendments and the APA, or obtain discovery on those issues. In contrast, the complaint in the District of Columbia action constituted a far broader facial challenge, under the Constitution and the APA, to the lawfulness of the Commission's across-the-board policy requiring disclosure of peer review materials. The District of Columbia court was bound to consider the University's First Amendment facial challenge and its APA claim regardless of the decision in the enforcement action. Thus, as in *Kerotest*, whether or not the enforcement action proceeded, there was "a strong

¹⁴ See also *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978) (pendency in second forum of "two additional lawsuits against other defendants . . . presenting the identical issue for resolution" warranted retention of jurisdiction in that forum).

probability that the [District of Columbia] suit nonetheless would have to be proceeded with."

In fact, the insistence of the Court below in proceeding in a piecemeal and duplicative fashion has created just the result that *Kerotest* sought to avoid. In spite of the decision in the enforcement action and the expenditure of significant judicial resources in connection with that case, the broader, more comprehensive first-filed action necessarily has continued to plow forward to decision on the myriad questions not presented by the more limited enforcement action. Not surprisingly, the decision to proceed piecemeal with the later-filed narrower action has also produced aberrational results. For example, the courts below refused even to consider the University's APA claim. The courts below seemed untroubled at the prospect that the subpoena they were ordering "enforced" may well have been issued pursuant to an unlawful rule. This type of tortured result, which is precisely what the first-filed rule was meant to prevent, was produced solely because of the decision not to defer to the more comprehensive first-filed action.

2. Avoidance of Inconsistent Results

The avoidance of inconsistent results is a central goal of the first-filed rule. The district courts have permitted a second-filed action to proceed only in the rare situation where the second "will in no way interfere with" the first-filed action and in fact "may facilitat[e] the work of the" first court.¹⁵ In this case, on the other hand,

¹⁵ In *Great Northern Ry. Co. v. National Railroad Adjustment Board*, 422 F.2d 1187, 1194 (7th Cir. 1970), a union brought suit in the District of Minnesota to enforce an award of the National Railroad Adjustment Board against the Great Northern. The Great Northern took the position that the relevant provision of the award was ambiguous, and it brought a suit in the District of Illinois, asserting its statutory right to compel the Adjustment Board to clarify its judgment. The Seventh Circuit held that the Illinois District Court should have retained jurisdiction of the

there is a strong possibility of inconsistent judgments. The Court of Appeals itself recognized, but glossed over, the problem that "the present procedural posture could lead to the anomalous result of the District of Columbia judge declaring the EEOC subpoena policy unconstitutional or unenforceable, but this court nevertheless ordering it to comply with the Eastern District of Pennsylvania judge's order enforcing the subpoena." 850 F.2d at 974 (Pet. App. A-8 to A-9). The Court of Appeals did not suggest any answer to the very troubling question of what the parties should do if confronted with such directly conflicting judgments of co-equal courts. While the Court of Appeals acknowledged that "this is the type of situation that prompted the first-filed rule," it refused to take the most obvious step to avert this "potential conflict." *Id.*

C. The Disapproval Of The Courts Below Of The University's Choice of Forum Did Not Justify A Departure From The First-Filed Rule.

For obvious reasons, neither the District Court nor the Court of Appeals based its departure from the first-filed rule on any of the considerations discussed above, relating to the rule's goal of sound judicial administration. Indeed, since the District Court denied the University's motion to dismiss on mootness grounds, it gave no reasons at all for departing from the first-filed rule.¹⁶

second-filed action, on the ground that the continued prosecution of both cases would best serve the interests of justice, in that the second-filed action, by compelling the Adjustment Board to interpret its award, would actually assist the Minnesota court in deciding the enforcement action. In this type of situation, the actions really are complementary rather than duplicative, and there is no risk of interference or inconsistent judgments.

¹⁶ As noted above, at pp. 7-8, the District Court issued no opinion. The first sentence of its two-sentence order summarily granted the Commission's application for enforcement of the subpoena and directed the University to produce the subpoenaed documents within ten days. Pet. App. A-35. The second sentence even

The Court of Appeals itself supplied the missing statement of reasons—a procedure that perverts the concept of an exercise of discretion by the District Court and alone warrants reversal.¹⁷ Based on the transcript of oral argument held in the District Court, the Court of Appeals surmised that the District Court retained jurisdiction because of its view that the University sued in the District of Columbia to avoid the impact of the *Franklin & Marshall* decision.¹⁸ In affirming, the Court of Appeals

more summarily denied the University's motion to dismiss "as moot." *Id.* Thus, the District Court never even considered the motion to dismiss before deciding the merits of the application for enforcement of the subpoena. This constituted clear error, because the motion to dismiss raised a threshold procedural issue that the District Court was obliged to decide before proceeding to the merits. See *Garrett v. City of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987) (requiring trial court to determine merits of pending discovery motion before ruling on motion for summary judgment). See also *Kelberine v. Societe Internationale*, 363 F.2d 989, 994 (D.C. Cir. 1966) (preliminary motion raising insufficient service of process had to be decided before considering dismissal for failure to state a claim).

¹⁷ The University so argued on appeal to the Third Circuit. Brief for Appellant, *EEOC v. University of Pennsylvania*, No. 87-1547 (3d Cir.), at 20-26. The District Court did not even consider the relevant factors or exercise its discretion in ruling on the University's motion to dismiss. The failure to exercise discretion where the exercise of discretion is required constitutes reversible error. See *Garrett*, 818 F.2d at 1518; *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264-65 (10th Cir. 1984). As in *Garrett*, "[t]his case . . . involves the failure of the trial court to exercise its discretion, not the abuse of it. Here, the court did not address the merits of [the University's] motion to [dismiss]; it merely denied the motion as 'moot' after having disposed of the case." 818 F.2d at 1518.

¹⁸ The Court of Appeals noted (850 F.2d at 973; Pet. App. A-7) that the District Court questioned counsel for the University as follows:

"As I see it, . . . we have . . . a case on point which was decided by, I repeat, Chief Judge Emeritus Lord, who was

adopted its own hypothesized reasons for the trial judge's decision and held that the first-filed rule "should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action." 850 F.2d at 978 (Pet. App. A-18). But even assuming that the District Court denied the University's motion to dismiss for the reasons supplied by the Court of Appeals, those reasons did not justify a departure from the first-filed rule.

1. A Litigant's Choice of an Otherwise Appropriate Forum With Applicable Precedent in Mind Is Neither Objectionable Nor a Valid Reason For Allowing a Duplicative Action to Proceed.

(a) *A litigant's motive is irrelevant to considerations of sound judicial administration.*

In a situation like this one, where the defendant in a first-filed action attempts to avoid litigating its claims in the original forum by bringing its own action in a different court, the resulting federal comity issues cannot be resolved by reference to the either party's motives. Once the University filed its complaint for declaratory and injunctive relief, the Commission could have responded by filing a counterclaim for enforcement of its

affirmed and maybe you are looking somewhere else, that you thought might result in something different than they did up here in the Third Circuit. That is possible, isn't it? . . . Isn't that why you did it? . . . Isn't that why you did it?" C.A. App. 56-57.

Counsel acknowledged that *Franklin & Marshall* "may have been a consideration," and added: "We certainly were aware of all the law in all the Circuits, but we did not choose a forum that was inappropriate for the action that we brought. We brought the action in the Commission's own backyard, where they are and made the decision in this case." *Id.* at 56; see also Pet. App. A-7 to A-8.

subpoena,¹⁹ and its failure to do so bespeaks its affirmative purpose to avail itself of the same Third Circuit precedent that the court below said the University was trying to evade. Thus, even assuming that the parties' respective motives were relevant, they would cancel each other out.

More significantly, the Court of Appeals made the same error in this case as it did in *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981), by holding that dismissal is precluded on the ground that it *might* result in a change in the governing law that would be adverse to the plaintiff in the Third Circuit.²⁰ In *Piper Aircraft*, the Third Circuit held in analogous circumstances that a district court could not dismiss an action on grounds of *forum non conveniens* "where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff." 454 U.S. at 238. This Court reversed, concluding that "[t]he possibility of a change in substantive law should ordinarily not be given conclu-

¹⁹ Fed. R. Civ. P. 13(b). Indeed, Rule 13(a) of the Federal Rules of Civil Procedure requires a pleader to "state as a counterclaim any claim which . . . the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." The Commission's enforcement claim falls within the broad purview of Rule 13(a), since it manifestly arises out of the "transaction or occurrence" comprising "the subject matter" of the University's claims in the District of Columbia action. Rule 13(a) was designed to prevent conduct like that of the Commission here, where it "failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." *Southern Construction Co. v. Pickard*, 371 U.S. 57, 60 (1962).

²⁰ As the Third Circuit noted (see 850 F.2d at 975; Pet. App. A-11), the District of Columbia Circuit is lacking in precedent on the issue of academic freedom and EEOC subpoenas.

sive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247. See also *id.* at 238.²¹

Although the Court recognized that the defendants in *Piper Aircraft* "may [have been] engaged in reverse forum-shopping" in moving to dismiss a Pennsylvania action in favor of a Scottish forum, "because they believe the laws of Scotland are more favorable" to them, the Court stressed that "this possibility ordinarily should not enter into a trial court's analysis" in exercising its discretionary authority to retain or dismiss an action. The Court explained that "regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum," dismissal should be ordered if the convenience factors weigh in favor of that result. *Id.* at 252 n.19. Similarly, in giving due regard to conservation of judicial resources and comprehensive disposition of litigation, the courts below should not even have taken into account the possibility of a change in governing precedent which they presumed would be favorable to the University and unfavorable to the Commission.

Consideration of applicable law simply has no role to play in the judicial administration calculus, any more than it does on a motion to dismiss for *forum non conveniens*.²² In either situation the danger of permitting

²¹ The Third Circuit's error here was even more egregious than its error in *Piper Aircraft*, because, as noted below, the federal courts are a unified system applying a unified body of law. The plaintiff in the second-filed action is not deprived of the application of federal law by dismissal of its action, as the plaintiff in *Piper Aircraft* was deprived of the benefit of United States law. Moreover, there was not even a previously pending action in *Piper Aircraft*.

²² Both doctrines are concerned with the orderly functioning of the courts as much as the treatment of the parties; indeed, the first-filed rule is more oriented to judicial administration, since the doctrine of *forum non conveniens* specifically takes into account factors of "private" as well as "public" interest. See *Piper Aircraft*, 454 U.S. at 241.

courts to consider what law will apply is obvious. When a court bases its retention of jurisdiction on possible differences in law, it necessarily and consciously favors one party (for whom the law of the forum is beneficial) over the other party. The Court has rightly prohibited such favoritism by the federal courts.

(b) *The District of Columbia was a proper forum for the University's claims.*

The Court of Appeals' intimation that there was something improper about the University's motive in bringing its action in the District of Columbia is completely unfounded. First of all, the District of Columbia court was the most logical, appropriate, and convenient forum for the University's challenge to the Commission's policy. That challenge, under the Constitution and the APA, was to the Commission's adoption and enforcement of a national rule requiring absolute disclosure of confidential peer review materials without any balancing of the competing First Amendment interests. The action thus centered on broad issues of national scope and importance. The University appropriately brought that action in the District of Columbia, where the Commission has its national headquarters, formulated its national rule, and applied that rule to the University through its determination on the University's petition to modify the *Tung* subpoena. The witnesses, documents, and other information relevant to the Commission's policy are also presumably located at the Commission's headquarters in the District of Columbia. For these reasons, Judge Jackson denied the Commission's belated motion to transfer the District of Columbia action to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).²³

²³ Under 28 U.S.C. § 1391 as it existed before 1962, the only place where an agency of the United States could be sued was in the District Court for the District of Columbia. See 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3815, at 152-53. In 1962, the venue provision for suits against the government was amended to provide potential plaintiffs with the venue

(c) *The choice of an otherwise appropriate forum with applicable precedent in mind is not objectionable.*

Under 28 U.S.C. § 1391(e), the University had the right to initiate its litigation in any one of several legitimate locales. Both the residence of the Commission and the place where the claim arose made the District of Columbia an appropriate forum; the residence of the University made the Eastern District of Pennsylvania a possible option.

choices now contained in 28 U.S.C. § 1391(e). Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744. The Senate Report on the amendment explained that the bill was "intended to facilitate review by the Federal courts of administrative actions." S. Rep. No. 1992, 87th Cong., 2d Sess. 2784, 2785 (1962). The change was motivated by the perception that the requirement of suing only in the District of Columbia was "an unfair imposition upon citizens who seek no more than lawful treatment from their Government." *Id.* See also *id.* at 2786 ("where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than . . . for the citizen who is aggrieved by the workings of Government.").

Thus, the venue provision for suing the federal government was expanded for the benefit of persons who wanted to challenge agency action. The Commission therefore is hard-pressed to say that it was inappropriate for the University to sue in the Commission's own backyard, which long was the only place for such a suit. Moreover, in creating localized venue choices, Congress was aware that

[f]requently, the administrative determinations involved are not made in Washington but in the field. . . . Frequently, these proceedings involve problems which are . . . peculiar to certain areas, such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently.

Id. 2786. In this case, on the other hand, the national policy challenged by the University was formulated by the Commission at its national headquarters in Washington and is of national significance.

In deciding which venue to choose, the general rule is that a lawyer not only may but should file suit in the legally appropriate forum most favorable to his client's claims. Minimal standards of competence require a lawyer to consider applicable precedent, among other things, before initiating a lawsuit in a particular forum. See C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3637 at 90-91 (when there is a choice of forums for a particular action, attorney quite properly will weigh what he or she conceives to be the tactical advantages and disadvantages of taking the case to one court or the other). Cf. *Van Dusen v. Barrack*, 376 U.S. 612, 634-35 (1964) (*forum non conveniens* "was not designed to narrow the plaintiff's venue privilege or to defeat the *state law advantages* that might accrue from the exercise of this venue privilege") (emphasis added). The Court of Appeals' contrary view boils down to the proposition that even when a particular forum is appropriate for a contemplated action, or even is the *most* appropriate forum for that action, the plaintiff nevertheless cannot file suit there, but instead must file in the forum where the plaintiff has the least chance of success—in order to escape a charge of "forum shopping." This cannot be the law.

Accordingly, just as this Court treated the applicable law and the parties' motives as irrelevant in *Piper Aircraft*, the lower federal courts' decisions in the context of of duplicative actions have also refused to deviate from the first-filed rule simply because the plaintiff in the first action chose to file suit in an otherwise appropriate forum where the law also was favorable.²⁴ The Court of

²⁴ If an exception to the first-filed rule were to be established by this Court for so-called "forum shopping"—even though such a decision would be unwise and contrary to logic and prior precedent—such an exception should exist only "where forum shopping alone motivated the choice of the situs for the first suit" and where the first plaintiff's asserted reasons for choosing a forum are "wholly frivolous." *William Gluckin & Co. v. International*

Appeals in this case acknowledged that "the District of Columbia suit was properly filed" and that Judge Jackson had so held in denying the Commission's motion to dismiss for lack of jurisdiction, improper venue, and failure to state a claim. 850 F.2d at 976 (Pet. App. A-13). And, as we have noted, Judge Jackson subsequently rejected the Commission's motion to transfer and found his court an appropriate forum for the litigation under the applicable § 1404(a) factors.

(d) *The Commission had no entitlement to the Third Circuit's interpretation of federal law.*

The Court of Appeals rested its decision on its characterization of the University's actions as an attempt to "circumvent local law." But this predicate for its decision is flawed, since the Third Circuit's decision in *Franklin & Marshall* is not "local law." The decision is a ruling by a divided three-judge panel of one Court of Appeals on an important issue of federal constitutional law, as to which there is currently a sharp division of opinion among the Circuits.²⁵

Playtex Corp., 407 F.2d 177, 178 (2d Cir. 1969) (emphasis added). The lower courts have not applied the "forum-shopping" exception when there is "logic" to the first plaintiff's choice of forum independent of any advantageous rules of law. See *Columbia Pictures Industries, Inc. v. Schneider*, 435 F. Supp. 742, 747 (S.D.N.Y. 1977).

²⁵ As is set forth more fully in the petition for certiorari (at 10-15), and as the decision of the Third Circuit in *Franklin & Marshall* itself acknowledges (775 F.2d at 114; Pet. App. A-43 to A-44), that decision conflicts with the holdings of at least two other Courts of Appeals. See *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983); *Gray v. Board of Higher Educ.*, 692 F.2d 901 (2d Cir. 1982). It also is out of line with the balancing approach that other Courts of Appeals have suggested they would endorse. See *Bergman v. Bowling Green State University*, 820 F.2d 1224 (6th Cir. 1987); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1347 (9th Cir. 1981); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977).

Thus, the "local law" that the Third Circuit insisted on applying is not "local law" at all, but rather its own interpretation of *federal* law, which the federal courts in the District of Columbia are equally capable of applying. "The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case." *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962).²⁶ Thus, a "plaintiff may not resist the transfer of his action to another district court [under § 1404(a)] on the ground that the transferee court will or may interpret federal law in a manner less favorable to him." *Id.* at 652.²⁷ *A fortiori*, the Commission could not side-step § 1404(a), file a duplicative action in the Pennsylvania federal court, and thereby be guaranteed the application of *Franklin & Marshall*. The Commission had no more right than any other litigant "to have the interpretation of one federal court rather than another determine [its] case," 312 F.2d at 652, and the Court of Appeals' pique at the possibility that *Franklin & Marshall* would not govern the University's challenge to the Commission's conduct, see 850 F.2d at 978 (Pet. App. A-17 to A-18), was inappropriate. The Court of Appeals' statement that the University's motive was to "circumvent local law" was wrong as a matter of law, since there was no "local law" to circumvent.

²⁶ Besides, the Court of Appeals' statement ignores the fact that there are two parties to this dispute. Even if there were any basis for the court's characterization of Third Circuit precedent as "local law" as to the University, such precedent would not be "local law" as to the Commission, which is an agency of the United States, headquartered in Washington.

²⁷ See also *Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956) (approving of transfer under § 1404(a) in spite of "alleged conflict of decision between this Circuit and the Seventh on an important question of law," and noting that resolution of the conflict is for the Supreme Court, not a district judge ruling on a transfer motion); *Ackert v. Ausman*, 198 F. Supp. 538, 545 (S.D.N.Y. 1961) (same).

2. The University's Action Was Not Preemptive.

The Court of Appeals also attempted to justify the District Court's departure from the first-filed rule on the ground that the University "instituted suit in one forum in anticipation of the opposing party's imminent suit in another, less favorable, forum." 850 F.2d at 976 (Pet. App. A-15).²⁸ To be sure, some courts have exercised their discretion to decline to hear declaratory judgment actions filed in an attempt to preempt an anticipated lawsuit. See, e.g., *Tempco Electric Heater Corp. v. Omega Engineering*, 819 F.2d 746 (7th Cir. 1987). At times, such dismissals have involved attempts to preempt government enforcement proceedings.²⁹ These cases, however, do not apply here, because the University's declaratory judgment action was filed for purposes other than just preempting an enforcement proceeding. Dismissals of declaratory judgment actions on grounds of preemption have been limited to situations in which the declaratory judgment plaintiff, suffering no injury other than

²⁸ The Court of Appeals focused in particular on the University's initiation of its action "three days before the expiration of the grace period during which the EEOC stated that it would not resort to a judicial enforcement proceeding." *Id.* at 977 (Pet. App. A-17).

²⁹ See, e.g., *General Electric Co. v. FTC*, 411 F. Supp. 1004, 1011 (N.D.N.Y. 1976); *Independent Tape Merchant's Ass'n v. Creamer*, 346 F. Supp. 456, 460-61 (M.D. Pa. 1972); *United States v. Cincinnati Transit, Inc.*, 337 F. Supp. 1068, 1073-74 (S.D. Ohio 1972). The correctness of these decisions is open to question, since there seems to be little harm in a litigant's use of the Declaratory Judgment Act to expedite resolution of issues that are likely to arise in an impending action. The courts that have found such a use of the Declaratory Judgment Act to be improper typically cite no authority for that conclusion. In authorizing declaratory judgment actions, Congress must have recognized that litigants sometimes would use them in anticipation of other filings, and Congress placed no explicit limits on such actions.

the fear that he might ultimately be sued and lose, seeks a declaration of non-liability in an attempt to "win any such case before it is commenced." *Public Service Comm'n v. Wycoff*, 344 U.S. 237, 245 (1952).³⁰ In such cases, courts have hesitated to permit "natural defendants," i.e., alleged wrongdoers, to employ the Declaratory Judgment Act to transform themselves into plaintiffs.

Here, however, the Declaratory Judgment Act was used by the University in a manner fully consistent with its purposes. The clarification of the administrative power of the EEOC to demand information alleged to be protected by the First Amendment is exactly the type of situation where a declaratory judgment action can be most useful and appropriate. Indeed, when the Declaratory Judgment Act was passed, it was believed that much of its usefulness would be found in the fields of constitutional and administrative law—in testing statutory and administrative powers of officials and in bringing contested issues between the government and private parties to a speedy resolution. Borchard, *The Federal Declaratory Judgments Act*, 21 Va. L. Rev. 35, 49 (1934).

Here, the University was suffering a greater injury than mere fear of ultimately losing a single subpoena enforcement action. It had suffered before the subpoena ever issued and stood to continue suffering long after the end of the battle over this particular subpoena. The University alleged that the Commission's adoption and enforcement of its national rule requiring disclosure of confidential peer review materials "has had and will continue to have a chilling effect on First Amendment rights" and,

³⁰ See also, e.g., *Hanes Corp. v. Millard*, 531 F.2d 585, 592-93 (D.C. Cir. 1976) ("[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure"); *Cunningham Bros. v. Bail*, 407 F.2d 1165, 1167 (7th Cir. 1969) ("to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act").

in particular, "will act to chill the First Amendment right of academicians to participate in the tenure review process and to speak freely and without fear that their confidences will be betrayed." J.A. 9. It is that "here and now" injury, which the District of Columbia court recognized in finding a ripe controversy, that the University sought to remedy through its declaratory judgment action and that legitimizes the University's invocation of the Declaratory Judgment Act.

The University was fully justified in seeking a declaration of the unlawfulness of the Commission's rule, without waiting for the Commission to initiate enforcement proceedings with respect to a particular subpoena.³¹ The legitimacy of the University's concern about possible future subpoenas is evidenced by the fact that the Commission already has issued another subpoena to the University seeking peer review materials. See p. 5 n. 3, *supra*. That the core problem faced by the University was far greater than one or even two subpoenas is evidenced not only by the repeated applications of the Commission's rule, but also by the widespread concern in the nation's academic community about the deleterious impact of the Commission's policy. See *id.* In such a situation, the University was not required to wait passively for each subsequent intrusion on its First Amendment rights; it was entitled to seek a more comprehensive resolution of the dispute now.

Under these circumstances, a declaratory judgment would "serve a useful purpose in clarifying and set-

³¹ Had the University brought suit earlier, it might have met with objections that it had failed to exhaust administrative remedies or that the action was not ripe. Furthermore, the record does not support a finding that the University acted in bad faith in bringing suit when it did. The Court of Appeals did not base its decision on bad faith and noted that "the district court's order includes no such finding." 850 F.2d at 977 (Pet. App. A-16).

ting the legal relations in issue, and . . . [would] terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." Wright, Miller & Kane, *Federal Practice & Procedure*, § 2759, at 647-48 (quoting E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941)). These are the fundamental purposes of the statute authorizing declaratory judgments, and they become especially important in the context of the assertion of First Amendment rights and the chilling effect caused by the spectre of future intrusions into protected activities.³² The University's legitimate interest in expeditiously counteracting the chilling effect of the Commission's conduct thus distinguishes the University's lawsuit from the anticipatory filing cases cited by the Court of Appeals, in which the plaintiff in the first-filed action had no independent interest in initiating suit and was really a defendant in plaintiff's clothing. There is no reasonable basis to characterize the action filed in the District of Columbia as merely "pre-emptive" of an action by the Commission to enforce a lone subpoena at one academic institution.³³

³² In addition to its concern for its own rights as an institution, the University also was concerned about protecting the freedom of its faculty to participate in the peer review process at other academic institutions. Accordingly, regardless of the issuance of any particular subpoena to the University, the Commission's peer review disclosure policy chilled the right of its faculty to respond to requests from other institutions for peer reviews. The significance of this factor is evidenced, at least in part, by the amicus brief of the American Association of University Professors filed in support of the petition for certiorari.

³³ Furthermore, even the true anticipatory nature of a first-filed suit does not, without more, justify a departure from the first-filed rule. Rather, in each case where the anticipatory nature of the filing has been cited in support of allowing a second-filed suit to take priority, other considerations also supported dismissal. See, e.g., *Ven-Fuel, Inc. v. Department of the Treasury*, 673 F.2d

3. *The Court of Appeals' Reasons Have Nothing To Do With Sound Judicial Administration, Which Was Ill-Served in This Case.*

A party's alleged motive "to circumvent local law" and "preempt" an imminent lawsuit does not eviscerate the first-filed rule. Promotion of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," *Kerotest*, 342 U.S. at 183, and to the avoidance of "duplicative litigation," *Colorado River*, 424 U.S. at 817, must dominate the district courts' exercise of discretion in applying the first-filed rule. The rule, after all, is concerned primarily with the proper functioning of the judicial system. The ultimate proof of the error of the courts below, in permitting the second-filed action to proceed, lies in the fact that that decision frustrated the first-filed rule's "primary purpose," acknowledged by the

1194 (11th Cir. 1982) (affirming dismissal of first action only after ascertaining that plaintiff could pursue all claims raised in that action in second forum); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d at 219 (considerations relating to "[e]fficient and responsible judicial administration" supported departure from first-filed rule); *Amerada Petroleum Corp. v. Marshall*, 381 F.2d 661, 663 (5th Cir. 1967) (second forum "more convenient" than first, which had only slight connection to controversy); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756 (E.D. Va. 1986) (second action supported by convenience factors and ability to join all relevant parties); *Creighton Omaha Regional Health Care Corp. v. Lomas & Nettleton Co.*, 486 F. Supp. 392 (D. Neb. 1980) (possibilities for comprehensive adjudication and convenience of parties and witnesses better in second action); *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742, 751 (S.D.N.Y. 1977) (departure from rule warranted by the "totality of the circumstances," especially considerations of efficiency); *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F. Supp. 563, 568 (S.D.N.Y. 1979) ("balance of convenience favors the [second] forum"); *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 382 (S.D.N.Y. 1962) (interests in effective, convenient, inexpensive, and prompt relief" justify transfer of first-filed action).

Court of Appeals, "to avoid burdening the federal judiciary and to prevent the judicial embarrassment of conflicting judgments." 850 F.2d at 977 (Pet. App. A-15).

The burden imposed in this case on the federal judiciary, not to mention the parties, has been large. The effect of the District Court's decision was to permit separate actions involving the same parties and the same issues to proceed simultaneously in two federal district courts less than 200 miles apart. Indeed, even as this Court is reviewing the Third Circuit's decision, cross-motions for summary judgment are pending before Judge Jackson. And, as was noted at pp. 20-21 above, there is a real potential for inconsistent judgments of the respective courts. In short, the denial of the University's motion to dismiss ensured the waste of judicial resources and the possibility of inconsistent judgments that the first-filed rule is meant to prevent.

II. THE DECISION AS TO WHICH COURT WILL DECIDE THE ACTION SHOULD BE MADE BY THE COURT FIRST POSSESSED OF JURISDICTION.

There is another component of this issue completely separate from the question of which court should entertain the merits of the dispute. That issue is which court should make that threshold determination. The absence of a clear rule as to which court should decide this preliminary question creates uncertainty and potential conflict between co-equal courts without any countervailing benefits. It encourages more than one federal court to become embroiled in the same litigation at the same time. In order to avoid this substantial waste of judicial resources, and the potential for conflicting rulings occasioned by such duplicative proceedings, many courts now have adopted a clear rule that the first court to acquire jurisdiction will decide which court will entertain the merits of the

case.³⁴ This procedure has been endorsed by at least one commentator, see *The Supreme Court, 1951 Term*, 66 Harv. L. Rev. 89, 169-170 (1953), and has been followed by the district courts with increasing frequency in recent decisions.³⁵ "Absent such a rule, there exists the possibility of inconsistent rulings on discretionary mat-

³⁴ See, e.g., *Pacesetter Systems*, 678 F.2d at 96 ("convenience factors should be addressed to the court in the first-filed action"); *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d at 1163, 1164 (a party who objects to first-filing plaintiff's choice of forum should raise that objection before the court in the first-filed action by way of a motion to dismiss or transfer; a second-filed action "cannot be used as a substitute for the rules of civil procedure"); *Sundstrand Corp. v. American Brake Shoe Co.*, 315 F.2d 273, 276 (7th Cir. 1963) (reversing injunction against prosecution of first-filed suit, noting appropriate procedure for second-filing litigant is "to intervene in the [first-filed] action and then move for a . . . transfer" to the jurisdiction of the second-filed action); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407, 408 (5th Cir. 1971) ("[i]n the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide whether it will try the case"); *Formflex Foundations, Inc. v. Cupid Foundations, Inc.*, 383 F. Supp. 497, 499 (S.D.N.Y. 1974) (denying motion to enjoin first-filed action and staying second-filed action, noting that the "proper remedy for [the second-filing litigant] is . . . a motion for a change of venue made" in the first-filed suit under 28 U.S.C. § 1404(a)).

³⁵ See *SW Indus., Inc. v. Aetna Cas. & Surety Co.*, 653 F. Supp. 631, 639 (D.R.I. 1987) (refusing to proceed with second-filed suit "in light of those cases holding that the decision as to which forum is more appropriate is a prerogative of the court hearing the first-filed action"); *Aloha Leasing v. Craig Germain Co.*, 644 F. Supp. 561, 566 (N.D.N.Y. 1986) ("district where the action is filed first should generally determine whether the first action should be permitted to proceed . . ."); *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 623 F. Supp. 912, 916 (D.P.R. 1985) (staying second action until such time as judge in first action decides transfer motion and motion to enjoin second action); *Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County*, 547 F. Supp. 1317, 1321 (S.D.N.Y. 1982) ("district court hearing the first-filed action should determine whether special circumstances dictate that the first action be dismissed in favor of a later-filed action.").

ters as well as duplication of judicial effort." *Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County*, 542 F. Supp. 1317, 1321 (S.D.N.Y. 1982).

Designating a single court to make this preliminary determination comports with sound judicial administration by ensuring that only one action will be permitted to proceed at one time. The procedure also fully protects the rights of the parties. If a defendant believes that the plaintiff's choice of forum is inappropriate, that defendant can seek to have the first-filed action dismissed or transferred. Claims such as improper venue, bad faith, anticipatory filing, inconvenience, or other matters affecting the interests of justice, all can be presented to the first court in an orderly and comprehensive fashion and a disposition reached without inefficiency or conflict.

Requiring objections to a forum selected by a plaintiff to be made in that forum, particularly by means of a motion to transfer under § 1404(a), is consistent with settled practice in the district courts.³⁶ This rule also is consistent with the procedure followed in connection with multiple appeals to the Courts of Appeals from administrative orders. Under 28 U.S.C. § 2112(a), if proceedings to review orders of administrative agencies "have been instituted in two or more courts of appeals with respect to the same order," the agency must file the record in the Court of Appeals "in which a proceeding with respect to such order was first instituted." The other Courts of Appeals "in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed." Subsequently, that Court of Appeals may transfer the whole set of proceedings "to any other court of appeals," if such a transfer would serve "the convenience of the parties in the interest of justice"—that is, according to the

³⁶ See, e.g., *Hospah Coal Co.*, 673 F.2d at 1164; *Sundstrand Corp.*, 315 F.2d at 275-76; *Formflex Foundations*, 383 F. Supp. at 499.

same considerations as are applicable to transfers between district courts under § 1404(a).³⁷

Prohibiting litigants from side-stepping one federal court by later filing suit elsewhere also is consistent with the many statutory provisions, rules, and common law principles that contribute to the efficient disposition of matters in one action. Among these are the statutory provision for multidistrict litigation, 28 U.S.C. § 1407, common law rules of *res judicata* and collateral estoppel, which prevent duplicative litigation and piecemeal claims; and the Federal Rules of Civil Procedure, which in connection with pleading (Rule 8), the assertion of permissive and compulsory counterclaims (Rule 13), the assertion of defenses (Rule 12), and the consolidation of actions (Rule 42), all serve to promote judicial efficiency and conserve judicial resources, with the common goal of "securing the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. This goal is substantially undermined when litigants file duplicative actions in the hope that such actions will not be stayed or dismissed by the second court.

In this case, the Commission should not have filed this duplicative action in the Eastern District of Pennsylvania. Rather, it should have counterclaimed for enforcement of the subpoena in the District of Columbia action, and if it thought that forum inconvenient under the settled principles of § 1404(a), it could have moved for

³⁷ Before the enactment of § 2112(a), venue for review of agency orders was controlled by the agency itself. See *Columbia Oil & Gas Corp. v. SEC*, 134 F.2d 265, 267 (3d Cir. 1943). Under the new provision, those affected by agency action would have their choice of venue; and in the case of multiple filings, § 2112(a) serves as "a mechanical device to determine which court will determine venue, not which court will ultimately hear the case. Transfer is entirely discretionary with the court of first filing." *Liquor Salesman's Union v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981).

transfer to the Eastern District of Pennsylvania.³⁸ But the Commission either failed to make the appropriate arguments to the District of Columbia court, or made them in that court and lost. See n. 38, *supra*. Rather than entrusting its fate to the discretion of that court, the Commission took evasive action by filing suit in the Pennsylvania federal court. The waste and conflict thereby engendered could have been avoided by adherence to the salutary rule already endorsed by many of the lower federal courts, that the court in the second-filed action should defer to the first court at least for a decision on this preliminary question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, with instructions to reverse the judgment of the District Court.

Respectfully submitted,

Of Counsel:

SHELLEY Z. GREEN
NEIL J. HAMBURG
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

STEVEN B. FEIRSON
(Counsel of Record)
ALAN D. BERKOWITZ
NANCY J. BREGSTEIN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000

Counsel for Petitioner

January 26, 1989

³⁸ While the Commission did not initially move for transfer under § 1404(a), it actually made arguments to Judge Jackson, in connection with its motion to dismiss, as to the inconvenience of the District of Columbia forum. See C.A. Supp. App. 224, 279, 285. In denying that motion, Judge Jackson necessarily rejected these arguments.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Section 709(a) of Title VII, 42 U.S.C. § 2000e-8(a), provides in pertinent part:

"In connection with any investigation of a charge filed under Section 2000e-5 of this title, the [Equal Employment Opportunity] Commission . . . shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."

Section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2), provides in pertinent part:

"In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such

person to appear before the Board, . . . there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

The Declaratory Judgments Act, 28 U.S.C. § 2201(a), provides in pertinent part:

"In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 1391(e) provides in pertinent part:

"A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or any agency of the United States, or the United States, may except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action"

28 U.S.C. § 1404(a) provides in pertinent part:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer an civil action to any other district or division where it might have been brought."

RESPONDENT'S

BRIEF

8
No. 88-493

Supreme Court, U.S.
FILED
FEB 27 1989

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

WILLIAM C. BRYSON
Acting Solicitor General
THOMAS W. MERRILL
Deputy Solicitor General
STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel
GWENDOLYN YOUNG REAMS
Associate General Counsel
LORRAINE C. DAVIS
Assistant General Counsel
HARRY F. TEPKER, JR.
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

11388

QUESTION PRESENTED

Whether the district court was obligated to dismiss the EEOC's subpoena enforcement action in deference to petitioner's anticipatory suit, which was brought for the purpose of avoiding unfavorable legal precedent when the enforcement action was imminent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	8
Argument:	
I. Comity does not invariably require dismissal of the second of two overlapping actions filed in different federal courts	11
II. Dismissal of the EEOC's subpoena enforcement action would undercut the enforcement of Title VII and violate principles of comity, equity, and sound judicial administration	13
A. The application of a first-filed rule in this case would undercut the procedure that Congress established to assure prompt and efficient enforcement of Commission subpoenas	14
B. Granting priority to petitioner's preemptive lawsuit would disserve comity and wise judicial administration	22
C. The court of appeals properly relied on the fact that an obvious and admitted objective of petitioner's preemptive suit was to avoid unfavorable federal precedent	26
III. The court of appeals' decision created no risk of duplication of judicial effort or inconsistent judgments and did not violate any other considerations of wise judicial administration	30
A. Petitioner's rulemaking claims were irrelevant to the enforceability of the Tung subpoena	31
B. There was no reason to require the subpoena's enforceability to be determined in the same action as petitioner's separable rulemaking claims	34

IV

Contents—Continued:	Page
IV. The Court should not adopt a procedural rule that requires the Commission to establish the proper venue for a subpoena enforcement action in a forum in which an anticipatory suit has been filed	37
Conclusion	40

TABLE OF CASES

Cases:

<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	12
<i>Amerada Petroleum Corp. v. Marshall</i> , 381 F.2d 661 (5th Cir. 1967)	22
<i>American Automobile Ins. Co. v. Freundt</i> , 103 F.2d 613 (7th Cir. 1939)	23, 28
<i>American Motors Corp. v. FTC</i> , 601 F.2d 1329 (6th Cir.), cert. denied, 444 U.S. 941 (1979)	15
<i>Anheuser-Busch, Inc. v. FTC</i> , 359 F.2d 487 (8th Cir. 1966)	15
<i>Atlantic Richfield Co. v. FTC</i> , 546 F.2d 646 (5th Cir. 1977)	15
<i>Brierwood Shoe Corp. v. Sears, Roebuck & Co.</i> , 479 F. Supp. 563 (S.D.N.Y. 1979)	25
<i>Brillhart v. Excess Ins. Co.</i> , 316 U.S. 491 (1942)	24
<i>Church of Scientology of California v. United States Department of the Army</i> , 611 F.2d 738 (9th Cir. 1979) ..	12, 37
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	11
<i>Columbia Pictures Ind., Inc. v. Schneider</i> , 435 F. Supp. 742 (S.D.N.Y. 1977)	25
<i>Columbia Plaza Corp. v. Security National Bank</i> , 525 F.2d 620 (D.C. Cir. 1975)	12
<i>Consolidated Rail Corp. v. Grand Trunk Western R.R.</i> , 592 F.Supp. 562 (E.D. Pa. 1984)	22
<i>Cunningham Brothers, Inc. v. Bail</i> , 407 F.2d 1165 (7th Cir.), cert. denied, 395 U.S. 959 (1969)	28
<i>EEOC, In re</i> , 709 F.2d 392 (5th Cir. 1983)	18
<i>EEOC v. A.E. Stanley Mfg. Co.</i> , 711 F.2d 780 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984)	18

V

Cases—Continued:	Page
<i>EEOC v. Bay Shipbuilding Corp.</i> , 668 F.2d 304 (7th Cir. 1981)	18, 39
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	5
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	17, 18
<i>EEOC v. South Carolina National Bank</i> , 562 F.2d 329 (4th Cir. 1977)	18
<i>EEOC v. Tempel Steel Co.</i> , 814 F.2d 482 (7th Cir. 1987)	18
<i>EEOC v. Tufts Institution of Learning</i> , 421 F. Supp. 152 (D. Mass. 1975)	33
<i>EEOC v. University of New Mexico</i> , 504 F.2d 1296 (10th Cir. 1974)	18
<i>EEOC v. University of Pittsburgh</i> , 643 F.2d 983 (3d Cir.), cert. denied, 454 U.S. 880 (1981)	18
<i>Elliott v. American Mfg. Co.</i> , 138 F.2d 678 (5th Cir. 1943)	15
<i>Endicott Johnson Corp. v. Perkins</i> , 317 U.S. 501 (1943)	18
<i>Factors Etc., Inc. v. Pro Arts, Inc.</i> , 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979)	12, 22
<i>Foreman v. Thalmayer</i> , 393 F. Supp. 1396 (N.D. Tex. 1975)	15
<i>FTC v. Claire Furnace Co.</i> , 274 U.S. 160 (1927)	15
<i>FTC v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980)	15
<i>General Electric Co. v. FTC</i> , 411 F. Supp. 1004 (N.D.N.Y. 1976)	16
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	33
<i>H.L. Green Co. v. MacMahon</i> , 312 F.2d 650 (2d Cir. 1962), cert. denied, 372 U.S. 928 (1963)	29
<i>Hanes Corp. v. Millard</i> , 531 F.2d 585 (D.C. Cir. 1976)	24, 28
<i>Hospah Coal Co. v. Chaco Energy Co.</i> , 673 F.2d 1161 (10th Cir.), cert. denied, 456 U.S. 1007 (1982)	23
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964)	15
<i>Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.</i> : 342 U.S. 180 (1952)	11, 24, 35, 37, 39
92 F.Supp. 943 (D.Del. 1950)	11

VI

Cases—Continued:

	Page
<i>Kline v. Burke Constr. Co.</i> , 260 U.S. 226 (1922)	11
<i>Lieberman v. Gant</i> , 630 F.2d 60 (2d Cir. 1980)	33
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982)	33
<i>Mattel, Inc. v. Louis Marx & Co.</i> , 353 F.2d 421 (2d Cir. 1965)	12, 13
<i>Mission Ins. Co. v. Puritan Fashions Corp.</i> , 706 F.2d 599 (5th Cir. 1983)	22
<i>National Emblem Ins. Co. v. Washington</i> , 482 F.2d 1346 (6th Cir. 1973)	22
<i>Occidental Life Insurance Co. v. EEOC</i> , 432 U.S. 355 (1977)	17
<i>Pacesetter Systems, Inc. v. Medtronic, Inc.</i> , 678 F.2d 93 (9th Cir. 1982)	12
<i>Perez v. Ledesma</i> , 401 U.S. 82 (1971)	23
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981)	26-27
<i>Provident Tradesmens Bank & Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	37
<i>Public Service Comm'n v. Wycoff Co.</i> , 344 U.S. 237 (1952)	15, 24
<i>Reisman v. Caplin</i> , 375 U.S. 440 (1964)	14
<i>Smith v. M'Iver</i> , 22 U.S. (9 Wheat) 532 (1824)	11
<i>State Farm Fire & Casualty Co. v. Taylor</i> , 118 F.R.D. 426 (M.D.N.C. 1988)	22
<i>Tempco Electric Heater Corp. v. Omega Engineering, Inc.</i> , 819 F.2d 746 (7th Cir. 1987)	22, 23, 28-29
<i>Triangle Conduit & Cable Co. v. National Elec. Products Corp.</i> , 125 F.2d 1008 (3d Cir.), cert. denied, 316 U.S. 676 (1941)	6
<i>United States v. Cincinnati Transit, Inc.</i> , 337 F. Supp. 1068 (S.D. Ohio 1972)	16
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	18
<i>United States v. Powell</i> , 379 U.S. 48 (1964)	18
<i>Upchurch v. Piper Aircraft Corp.</i> , 736 F.2d 439 (8th Cir. 1984)	12
<i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1964)	28
<i>Ven-Fuel, Inc. v. Department of the Treasury</i> , 673 F.2d 1194 (11th Cir. 1982)	22

VII

Cases—Continued:

	Page
<i>Wearly v. FTC</i> , 616 F.2d 662 (3d Cir.), cert. denied, 449 U.S. 822 (1980)	15
<i>William Gluckin & Co. v. International Playtex Corp.</i> , 407 F.2d 177 (2d Cir. 1969)	12, 28
<i>Yoder v. Heinhold Commodities, Inc.</i> , 630 F. Supp. 756 (E.D. Va. 1986)	22
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976)	39

Statutes, regulations and rules:

Administrative Procedure Act, 5 U.S.C. 553	5
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253, 42 U.S.C. 2000e <i>et seq.</i> :	
§ 706(b), 42 U.S.C. 2000e-5(b)	2
§ 709(a), 42 U.S.C. 2000e-8(a)	2, 3, 31
§ 710, 42 U.S.C. 2000e-9	2, 3, 14, 20, 31
§ 710(b), 78 Stat. 264	20
§ 710(c), 78 Stat. 264	20
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-104	31
National Labor Relations Act, 29 U.S.C. 151 <i>et seq.</i> :	
§ 11, 29 U.S.C. 161	2
§ 11(1), 29 U.S.C. 161(1)	3, 20, 28
§ 11(2), 29 U.S.C. 161(2)	3, 14
28 U.S.C. 1404(a)	28
29 C.F.R. 1601.16(b)	3
Fed. R. Civ. P. 13	39

Miscellaneous:

EEOC, <i>A Report on the Operations of the Office of General Counsel: October 1986—September 1987</i> (July, 1988)	19
Fed. R. Civ. P. 57 advisory committee note, 28 U.S.C. App. at 626 (1982)	15
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971)	21, 31, 32
6A J. Moore, <i>Moore's Federal Practice</i> (1987)	24
S. Rep. No. 415, 92d Cong., 1st Sess. (1971)	21

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 850 F.2d 969. The orders of the district court (Pet. App. A34-A35) are unreported. The determination of the Equal Employment Opportunity Commission denying petitioner's application for modification of the Commission's subpoena (Pet. App. A29-A33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1988. A petition for rehearing was denied on August 11, 1988 (Pet. App. A28). The petition for a writ of certiorari was filed on September 19, 1988, and was granted on December 12, 1988, limited to the second question stated in the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 706(b), 709(a) and 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), 2000e-8(a), 2000e-9, and of Section 11 of the National Labor Relations Act, 29 U.S.C. 161, which is incorporated by reference in 42 U.S.C. 2000e-9, are reproduced in an appendix to respondent's brief in opposition (Br. Opp. App. 1a-3a).

STATEMENT

This subpoena enforcement action was initiated by the Equal Employment Opportunity Commission (the Commission or the EEOC) to enforce a subpoena served on petitioner, the University of Pennsylvania, in accordance with Title VII of the Civil Rights Act of 1964. The subpoena sought information relevant to a charge of discrimination filed by Rosalie Tung, an associate professor who was denied tenure by petitioner. The district court entered a judgment enforcing the subpoena, and the court of appeals affirmed. Petitioner maintains that the lower courts erred by failing to dismiss this action in deference to an action that it filed in the District of Columbia when subpoena enforcement proceedings were imminent.

1. Under Title VII, the Commission is responsible for investigating charges of discrimination filed by individuals or members of the Commission.¹ To enable the Commission to discharge this responsibility, Title VII grants it access to "any evidence of any person being investigated * * * that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under in-

¹ Section 706(b) of Title VII of the Civil Rights Act of 1964 (hereinafter Title VII), 42 U.S.C. 2000e-5(b).

vestigation."² The Commission also has the authority to issue subpoenas "for any evidence of any person being investigated * * * that relates to any matter under investigation."³

Under the statute and applicable regulations, an employer who wishes to challenge such a subpoena must apply to the Commission, not a court, for revocation or modification of the subpoena.⁴ If an employer refuses to provide information responsive to a subpoena, the Commission is empowered to apply to the district court for the district within which "the inquiry is carried on" or the "person guilty of * * * refusal to obey is found or resides or transacts business" for an order compelling compliance.⁵

2. Rosalie Tung, an Associate Professor in the Management Department of the Wharton School, was denied tenure by a vote of petitioner's Personnel Committee. In August 1985, she filed a charge of discrimination with the Commission (J.A. 23-26). As subsequently amended, the charge alleged that Tung had been the subject of discrimination on the basis of race, sex, and national origin (J.A. 27-28).

In her charge, Tung expressed the belief that her Department Chairman, who she claimed had sexually harassed her, had submitted a negative letter to the Personnel Committee (J.A. 28-29). The charge also alleged that Tung's qualifications were equal to or better than those of five named male candidates for tenure who had

² Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a).

³ Section 11(1) of the National Labor Relations Act, 29 U.S.C. 161(1), incorporated in Section 710 of Title VII, 42 U.S.C. 2000e-9.

⁴ 29 U.S.C. 161(1), incorporated in 42 U.S.C. 2000e-9; 29 C.F.R. 1601.16(b).

⁵ Section 11(2) of the National Labor Relations Act, 29 U.S.C. 161(2), incorporated in 42 U.S.C. 2000e-9.

received more favorable treatment (*ibid.*). Tung alleged that she had been given no reason for the decision to deny her tenure, but had discovered that the Personnel Committee had attempted to justify its decision "on the ground that the Wharton School is not interested in China-related research" (J.A. 29). This explanation, the charge suggested, was a pretext for discrimination—*i.e.*, "simply their way of saying they do not want a Chinese-American, Oriental, woman in their school" (*ibid.*).

The EEOC began an investigation into Tung's charge, and requested relevant information from petitioner. When petitioner refused to provide some of that information, the Commission issued a subpoena seeking: (i) copies of Tung's tenure file; (ii) copies of the tenure files of the five male candidates for tenure identified in Tung's charge; (iii) the identity, tenure status and qualifications of those individuals who comprised the tenure committees for petitioner's Management Department from June 1984 to the date of the subpoena; and (iv) the identity of all members of the Personnel Committee (J.A. 21-22).

Petitioner refused to produce certain documents responsive to the first two of these specifications. It applied to the Commission for modification of the subpoena to exclude what it termed "confidential peer review information"—specifically, letters of evaluation and "documents reflecting the internal deliberations of faculty committees considering applications for tenure" (C.A. J.A. 8-9)—relating to Tung and the five male tenure candidates named in Tung's charge.

On April 10, 1987, the Commission denied petitioner's application (Pet. App. A29-A33). The Commission explained that the documents that petitioner had withheld were "needed in order to make a determination on the allegations of employment discrimination made by Ms. Tung in her charge"—*i.e.*, "whether Ms. Tung was treated

differently than those who received tenure" (*id.* at A30). Requiring production of this information, the Commission continued, was "fully supported by the applicable law in the Third Circuit, where this charge arose" (*id.* at A30-A31, citing *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)). The Commission refused to balance its need for this information against petitioner's asserted interest in confidentiality; it "reject[ed] such an approach in the instant case as it would impair the Commission's ability to fully investigate this charge of discrimination * * *" (Pet. App. A33). The Commission requested compliance with the subpoena within 20 days to avoid subpoena enforcement proceedings (*ibid.*).

3. Three days before the 20-day grace period expired, petitioner filed an action in the United States District Court for the District of Columbia. The complaint sought an order quashing the Commission's subpoena (J.A. 12-13, 14). It also requested declaratory relief on the basis of an allegation that the Commission had adopted "a rule which requires total and absolute disclosure by colleges and universities of all peer evaluation material used in making tenure decisions" (J.A. 4). This rule, the complaint alleged, had been promulgated in violation of the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553, and infringed petitioner's rights under the First and Fifth Amendments (J.A. 4, 8-12, 13-14). The Commission moved to dismiss this action on the grounds of improper venue, lack of subject-matter jurisdiction, and failure to state a claim (C.A. Supp. J.A. 217-245).

4. On June 19, 1987, the Commission applied to the United States District Court for the Eastern District of Pennsylvania, by means of an application for an order to show cause, for an order enforcing its subpoena (J.A. 15-30). Petitioner moved to dismiss, arguing that the

"first-filed rule" required dismissal of the subpoena enforcement action in view of the pendency of the District of Columbia suit (C.A. J.A. 29-43). On September 1, 1987, the court entered a brief order enforcing the Commission's subpoena and denying petitioner's motion to dismiss "as moot." Pet. App. A35.

Two days later, the District of Columbia district court — also without an opinion — denied the EEOC's motion to dismiss petitioner's action (J.A. 31). That court later refused to stay its proceedings pending petitioner's appeal to the Third Circuit (J.A. 32).

5. The Third Circuit affirmed the district court's order denying the motion to dismiss the subpoena enforcement action and enforcing the EEOC's subpoena (Pet. App. A1-A27).

a. After recounting the history of the Third Circuit's application of the "first-filed rule," the panel noted that courts have " 'the power' to enjoin the subsequent prosecution of proceedings involving the same parties and the same issues already before another court." Pet. App. A3 (quoting *Triangle Conduit & Cable Co. v. National Elec. Products Corp.*, 125 F.2d 1008, 1009 (3d Cir.), cert. denied, 316 U.S. 676 (1942)). But, the court continued, that authority "is not a mandate directing wooden application of the rule without regard to rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping" (*ibid.*).

Having concluded that the application of the "first-filed rule" was discretionary, the court of appeals held that the district court did not abuse its discretion by refusing to dismiss the Commission's subpoena enforcement action (Pet. App. A4, A14). The court of appeals found that "[t]he timing of the University's filing in the District of Columbia indicates an attempt to preempt an imminent

subpoena enforcement in the Eastern District of Pennsylvania" (*id.* at A16), and noted petitioner's acknowledgment that the decision in *Franklin & Marshall* "presented a problem with respect to its plan to contest the EEOC's refusal to modify the subpoena" (*id.* at A17). The court expressed concern that, if the District of Columbia Circuit would refuse to enforce the subpoena, "litigants from throughout the country will avoid local enforcement actions by first obtaining a favorable ruling in the District of Columbia" (*ibid.*), even though there was "no indication that Congress intended the District of Columbia courts to play such a pivotal role in Title VII enforcement" (*id.* at A18). The court concluded (*ibid.*):

Because the first-filed rule is based on principles of comity and equity, it should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action.

The court found further support for its conclusion in "two themes emphasized by Congress when it enacted Title VII" (Pet. App. A18). Application of the "first-filed rule" in this case, the court explained, would "undermine the congressional policy favoring prompt resolution of discrimination claims" and would discourage meaningful conciliation (*id.* at A19). The court concluded that "[t]he purposes of Title VII, along with this Court's precedent and the principles underlying the first-filed rule, are better served by rejecting the University's effort to dismiss the second-filed suit" (*ibid.*).

b. Turning to the enforceability of the Commission's subpoena, the court of appeals ruled that petitioner was entitled to assert the First Amendment as a defense to compliance with the Commission's subpoena, but concluded that the Third Circuit's decision in *Franklin & Mar-*

shall College required rejection of that defense (Pet. App. A22). The court did not reach the merits of petitioner's Administrative Procedure Act claims, holding that those claims did not constitute a valid defense to enforcement of the subpoena. The court explained that "[p]ursuant to an express congressional grant of authority, the EEOC is empowered to subpoena records relating to a charge of discrimination" (*id.* at A25). "Invalidation of an alleged EEOC subpoena 'rule' in an enforcement proceeding would not," therefore, "overrule the EEOC's statutory grant of investigative subpoena power in individual cases" (*ibid.*). The court found that the Commission had made the showings required by the statute for enforcement of its subpoena in this case, and that "consideration of the type of APA defense asserted by the University would impede the EEOC's statutory mandate to promptly investigate whether a Title VII violation has occurred" (*ibid.*).

Finally, the court of appeals remanded the case to the district court for consideration of whether petitioner should be allowed to delete names and other identifying information from the disputed records before complying with the subpoena (Pet. App. A26-A27). With this exception, the court affirmed the district court's order enforcing the EEOC's subpoena (*id.* at A27).

6. This Court granted the petition for a writ of certiorari on December 12, 1988, limited to the second question presented, which raises the issue whether the lower courts erred in failing to dismiss this action (J.A. 33).

SUMMARY OF ARGUMENT

When cases involving identical issues are pending before two federal district courts, the general principle has been to avoid duplicative litigation. In many cases, that goal may be served by allowing only the first of two overlap-

ping actions to proceed. That alternative, however, is not invariably the correct one. Wise judicial administration does not counsel any rigid, mechanical solution to such problems.

In this case, petitioner filed a challenge to the Commission's subpoena in the District of Columbia, joined with other claims addressed to an allegedly unlawful Commission rule, when the filing of a subpoena enforcement action was imminent. The lower courts properly refused to dismiss the subsequent enforcement proceeding in deference to petitioner's anticipatory suit.

Dismissal of the enforcement suit would have undercut the statutory procedure established by Congress to enable the Commission to enforce Title VII. Indeed, in an amendment to the Act passed in 1972, Congress withdrew the employer's right under the original statute to file an action challenging a request by the Commission for information. Petitioner and other employers should not be permitted to nullify this amendment, and secure dismissal of an action filed in accordance with Title VII, by filing a preemptive action under the Declaratory Judgment Act. Claims for anticipatory remedies may not be employed to undermine the avenues of judicial review that Congress has prescribed.

Granting priority to petitioner's District of Columbia suit would also disserve the interests of comity. Applying a "first-filed rule" to a preemptive suit of this kind tends to multiply litigation in the federal courts and to discourage responsible efforts to settle disputes without litigation. Anticipatory relief is particularly inappropriate when it is sought as a means of avoiding a particular circuit's precedent. The interests of the federal judicial system and comity are served when federal courts refuse to allow an-

ticipatory remedies to be used to transfer disputes for which Congress has prescribed a particular venue.

By proceeding in this action, the lower courts did not create any risk of inconsistent judgments or duplication of effort. Petitioner's rulemaking claims, which are no defense to enforcement of the subpoena, will be heard and determined only in the District of Columbia. Questions concerning the enforceability of the subpoena were properly resolved by the courts below, and the District of Columbia courts will not address those questions. For related reasons, the usual preference for comprehensive, consolidated litigation does not apply to this case. Because any judgment regarding the Commission's alleged rule of disclosure could not affect the enforceability of the subpoena, an order compelling compliance should not await the time when petitioner's separable and immaterial rulemaking claims are ripe for decision.

Petitioner's argument that the Commission should have been prohibited from filing its statutory enforcement action in the Eastern District of Pennsylvania—and should instead have been required to establish its right to proceed in that forum through motions filed in the District of Columbia action—is simply a reformulation of its proposed first-filed rule in a “procedural” guise. The effect of that proposal would be to substitute, for the summary and certain subpoena enforcement procedure that Congress provided, a circuitous procedural route that would necessarily pass through a forum of petitioner's choosing. That burdensome procedural proposal suffers from the very same shortcomings as petitioner's substantive first-filed rule and is even more rigid in its application.

ARGUMENT

I. COMITY DOES NOT INVARIABLY REQUIRE DISMISSAL OF THE SECOND OF TWO OVERLAPPING ACTIONS FILED IN DIFFERENT FEDERAL COURTS

When cases involving identical issues are pending before two federal district courts, “though no precise rule has evolved, the general principle is to avoid duplicative litigation.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In most “cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it.” *Smith v. M'Iver*, 22 U.S. (9 Wheat.) 532, 535 (1824).⁶ Nevertheless, this principle of comity is not absolute. As this Court stated in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-184 (1952):

Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.[⁷]

⁶ There is, of course, no jurisdictional bar that precludes two courts from simultaneously entertaining overlapping *in personam* actions. *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

⁷ Contrary to petitioner's suggestion, the Court did not rule “in favor of a first-filed action” in *Kerotest* (Pet. Br. 19). Rather, it joined the Third Circuit in reversing a judgment of the district court that had been based on rigid application of the first-filed rule. See *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 92 F. Supp. 943, 947 (D. Del. 1950). Though the Court declined to favor any particular approach to the problems raised by overlapping suits, it did observe that the case law did not reflect “any rigid rule” of priority like that the district court had applied. 342 U.S. at 184 n.3.

Often citing *Kerotest*, most courts have found that comity does not invariably require a court to grant priority to the first of two overlapping actions.³ Although the lower courts have used various formulations in describing the extent of the priority due to the first-filed suit, the Ninth Circuit's statement is typical (*Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982) (quoting *Church of Scientology of California v. United States Department of the Army*, 611 F.2d 738, 750 (9th Cir. 1979)):

Normally sound judicial administration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action. However, this "first to file" rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration. * * *

* * * "Circumstances and modern judicial reality * * * may demand that we follow a different approach from time to time * * *."

As these authorities reflect, comity does not embody "a firm legal principle requiring dismissal of the second-filed

³ See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 155 (1967) ("A court may * * * in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere."); *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218-219 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177, 179 (2d Cir. 1969); *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 (2d Cir. 1965); *Upchurch v. Piper Aircraft Corp.*, 736 F.2d 439 (8th Cir. 1984); *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93 (9th Cir. 1982); *Church of Scientology of California v. United States Department of Army*, 611 F.2d 738, 749-750 (9th Cir. 1979).

suit without regard to the circumstances of the case" (Pet. App. A14). When there are "factors of substance" (*Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 (2d Cir. 1965)), that justify proceeding with the second of two suits, comity does not require otherwise.

II. DISMISSAL OF THE EEOC'S SUBPOENA ENFORCEMENT ACTION WOULD UNDERCUT THE ENFORCEMENT OF TITLE VII AND VIOLATE PRINCIPLES OF COMITY, EQUITY, AND SOUND JUDICIAL ADMINISTRATION

Petitioner's central contention is that the court of appeals misapplied the principle of comity. In its view, comity *requires* a court to dismiss the second of two overlapping actions, unless a different result can be justified in terms of "principles of sound judicial administration" (Pet. Br. 17-18). Petitioner also advocates a narrow view of the relevant "judicial administration calculus" (*id.* at 25). According to petitioner, courts must focus only on "conserving judicial resources, avoiding inconsistent results, and facilitating the comprehensive disposition of litigation" (*id.* at 18).

Though these are often legitimate concerns, they do not exhaust the considerations relevant to the disposition of overlapping lawsuits. The lower courts' refusal to dismiss this subpoena enforcement action was fully justified by the need to preserve the integrity of the procedures Congress created to enforce Title VII—a statute which, remarkably, is not cited once in petitioner's 40-page brief. Moreover, as the court of appeals emphasized, neither comity nor sound judicial administration supports the application of a "first-filed rule" when, as in this case, the effect would be to encourage preemptive lawsuits and discourage attempts to resolve disputes without litigation.

A. The Application Of A "First-Filed Rule" In This Case Would Undercut The Procedure That Congress Established To Assure Prompt And Efficient Enforcement Of Commission Subpoenas

Title VII and accompanying regulations establish a procedure for resolving disputes over the enforceability of Commission subpoenas. Under that procedure, an employer has the right to seek modification or revocation from the Commission, but not from a court. The Act specifies the party who is to initiate litigation over a subpoena — the Commission — and the forum in which that action is to be brought — the district court for the district in which "the inquiry is carried on" or in which the person subpoenaed "is found or resides or transacts business."⁹ In this case, petitioner filed an anticipatory suit in the District of Columbia to avoid having the enforceability of the subpoena determined in accordance with this statutory procedure. It argues, nevertheless, that the principle of comity *requires* a court to dismiss the action prescribed by Title VII because it was not first in time. That argument is without merit. As between an anticipatory action and the enforcement action prescribed by Title VII, a court should grant priority to the action filed in accordance with the Act.

1. This Court has refused to allow anticipatory lawsuits to displace statutory procedures for determining an agency's entitlement to information. In *Reisman v. Caplin*, 375 U.S. 440 (1964), the Court directed the dismissal of an anticipatory suit challenging an IRS summons, holding that the enforceability of the summons should be determined if and when the IRS filed an action to enforce. The Court rejected the claim that the statutory enforcement proceeding would not provide an adequate

⁹ 42 U.S.C. 2000e-9, incorporating 29 U.S.C. 161(2).

opportunity to contest the legality of the summons, and remitted the plaintiffs to the procedures established by Congress in the Internal Revenue Code (*id.* at 450):

Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity, we remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed.¹⁰

Consistent with *Reisman*, the lower courts have consistently refused to entertain anticipatory challenges to administrative subpoenas issued and enforced through procedures indistinguishable from those prescribed by Title VII.¹¹

¹⁰ See also *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980) ("Judicial review should not be a means of turning prosecutor into defendant before adjudication concludes."); *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964) (declaratory relief "should not be granted where a special statutory procedure has been provided"); *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 246-247 (1952); *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927); Fed. R. Civ. P. 57 Advisory Committee Note, 28 U.S.C. App. at 626 (1982).

¹¹ *Wearly v. FTC*, 616 F.2d 662 (3d Cir.), cert. denied, 449 U.S. 822 (1980); *American Motors Corp. v. FTC*, 601 F.2d 1329 (6th Cir.), cert. denied, 444 U.S. 941 (1979); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646 (5th Cir. 1977); *Anheuser-Busch, Inc. v. FTC*, 359 F.2d 487 (8th Cir. 1966). See also *Elliott v. American Mfg. Co.*, 138 F.2d 678, 679 (5th Cir. 1943) (observing, in case challenging NLRB investigation, that it is not "appropriate for the courts to interfere prematurely in the proceedings of the public boards and commissions, nor to depart without good reason from the procedure the statutes lay down in respect of them"); *Foreman v. Thalmayer*, 393 F. Supp. 1396 (N.D. Tex. 1975) (refusing to hear action challenging EEOC subpoena in advance of subpoena enforcement action).

These cases conclusively rebut petitioner's suggestion that "there seems to be little harm in a litigant's use of the Declaratory Judgment

The logic of these cases forecloses the claim that comity requires the dismissal of an administrative enforcement proceeding in deference to a prior-filed anticipatory suit. If it is impermissible to allow an anticipatory action to proceed when no enforcement proceeding has been brought, as *Reisman* held, the pendency of such an action cannot require dismissal of a later-filed enforcement suit. Consistent with this reasoning, the lower courts have refused to grant priority to suits designed to anticipate issues that have also been raised in pending administrative enforcement proceedings, without regard to the order of filing.¹²

2. To dismiss this statutory enforcement proceeding on the strength of a first-filed rule would seriously impede the Commission's ability to enforce Title VII. That Act sets forth "an integrated, multistep enforcement pro-

Act to expedite resolution of issues that are likely to arise in an impending action." Pet. Br. 31 n.29. As this case demonstrates, moreover, the purpose and effect of such suits is rarely to *expedite* the resolution of issues that Congress has committed to a summary enforcement proceeding.

¹² *General Electric Co. v. FTC*, 411 F. Supp. 1004, 1011 (N.D.N.Y. 1976); *United States v. Cincinnati Transit, Inc.*, 337 F. Supp. 1068, 1070 (S.D. Ohio 1972). *General Electric* is particularly apt. In that case, the FTC had ordered electrical manufacturers to provide it with specified information and set a due date for compliance. Before the due date, some of the affected companies filed actions seeking declaratory judgments that the agency's request for information was unlawful. After the due date had passed, the FTC filed an action in the District of Columbia seeking enforcement of its order. The district court hearing the anticipatory suits ordered them transferred to the District of Columbia, where the enforcement proceeding was pending. One ground for this ruling was the court's conclusion that the legality of the order should be determined in the FTC's enforcement action, "which has fewer procedural and pretrial tangles and which was specifically created by Congress for such purposes" (411 F. Supp. at 1011).

cedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359 (1977)).

The Commission's statutory access to "any relevant evidence," backed by reliable procedures for enforcing its subpoenas, is a critical element of this enforcement scheme. To preserve the effectiveness of the Commission's investigatory authority, this Court and the lower courts have consistently rejected efforts to burden subpoena enforcement proceedings with cumbersome procedures. For instance, in *Shell Oil*, the Court rejected an interpretation of the statute and applicable regulations that would have made enforcement of a subpoena dependent upon the contents of a charge of discrimination.¹³ Recognizing that litigation over the form of the charge and the possibility of subsequent appeals "would substantially slow the process by which the EEOC obtains judicial authorization to proceed with its inquiries," the Court was unwilling to "place a potent weapon in the hands of employers * * * who wish * * * to delay as long as possible investigations by the EEOC." 466 U.S. at 81. Accord *id.* at 93 (O'Connor, J.,

¹³ We note that the *Shell Oil* case began as an action to enjoin an investigation by the EEOC and, in connection therewith, to quash a Commission subpoena; a subsequent EEOC subpoena enforcement action was transferred and consolidated with the employer's injunctive suit. 466 U.S. at 59-60. The propriety of this procedure was not before the Court in *Shell Oil*. Moreover, unlike this case, the employer's claims went to the legality of the investigation as a whole. Even by implication, therefore, *Shell Oil* does not suggest that an employer can choose the forum in which the enforceability of a subpoena will be determined by joining a request that the subpoena be quashed with claims, like petitioner's rulemaking claims, that do not affect the Commission's authority to conduct an investigation.

concurring in part and dissenting in part) (the Commission has a "strong interest in avoiding a 'minitrial' on every discovery request"). The Court also reaffirmed that the Commission is entitled to enforcement of its subpoenas without any threshold showing on the merits of a charge.¹⁴ In keeping with the Act's emphasis on effective enforcement, an EEOC subpoena enforcement action "should be only a skirmish, quickly brought and just as quickly ended." *In re EEOC*, 709 F.2d 392, 402 (5th Cir. 1983).

If a first-filed rule were applied so as to require dismissal of a subpoena enforcement action whenever an employer initiated a preemptive suit, it would be "a potent weapon in the hands of employers" who wish to delay the Commission's investigations. *EEOC v. Shell Oil Co.*, 466

¹⁴ 466 U.S. at 72 n.26. See *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987). In *Tempel Steel*, the Seventh Circuit explained that the role of a court asked to enforce a subpoena is "sharply limited" and continued:

Such proceedings are designed to be summary in nature. * * * As long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant, the district court must enforce an administrative subpoena. * * *

* * * If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay.

Accord, e.g., *EEOC v. A.E. Stanley Mfg. Co.*, 711 F.2d 780, 783 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984); *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 308-310 (7th Cir. 1981); *EEOC v. University of Pittsburgh*, 643 F.2d 983, 985 (3d Cir.), cert. denied, 454 U.S. 880 (1981); *EEOC v. South Carolina National Bank*, 562 F.2d 329 (4th Cir. 1977); *EEOC v. University of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974). See *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

U.S. at 81. It is not difficult to plead claims for declaratory or injunctive relief based on allegations that a subpoena or associated regulation threatens to infringe an employer's constitutional rights. If the mere filing of such claims required the Commission to seek enforcement of its subpoena in the same action, at the time and place of the employer's choosing, recalcitrant employers would often file preemptive suits. Those filings would also undoubtedly be accompanied by attempts to complicate enforcement of a subpoena with the motions practice and discovery that are typical of civil litigation but totally out of place in a summary subpoena enforcement proceeding. In light of the number of investigations that the Commission conducts, its reliance on voluntary compliance with subpoenas, and the large number of subpoena enforcement proceedings that it initiates each year, the rule for which petitioner argues would seriously damage the Commission's ability to discharge its responsibilities under Title VII.¹⁵

¹⁵ Subpoena enforcement actions are an important aspect of the EEOC enforcement program. The chart below summarizes the number of such actions brought and resolved in this decade (*EEOC, A Report on the Operations of the Office of General Counsel: October 1986 - September 1987* (July, 1988)):

SUBPOENA ENFORCEMENT ACTIONS FILED
AND RESOLVED 1980-1988

	1980	1981	1982	1983	1984	1985	1986	1987
Filed	32	76	77	59	88	125	99	97
Resolved	N/A	N/A	N/A	48	48	90	76	103

The number of subpoenas issued by the EEOC is far greater than the number of enforcement actions. Most employers comply voluntarily with subpoenas, no doubt in part because of the courts' unwillingness to allow delay in subpoena enforcement actions.

3. The history of Title VII's enforcement provisions reinforces this conclusion. In its original form, Title VII expressly allowed either the employer or the Commission to initiate judicial proceedings to determine the enforceability of the Commission's requests for information. The Commission sought information by issuing a "demand."¹⁶ When a demand had been made, the employer was authorized by the Act to file "a petition for an order * * * modifying or setting aside such demand" in federal court in the district in which it resided, was found, or transacted business. The Commission could seek an order requiring compliance with the demand in the same forum.¹⁷

In 1972, however, Congress repealed this system of demands for evidence and dual review, and gave the Commission the powers exercised by the National Labor Relations Board under the National Labor Relations Act. The employer no longer has a right under Title VII to challenge the legality of a request for information, which now takes the form of a subpoena, in a court.¹⁸ Only the Commission is authorized by Title VII to seek judicial review.¹⁹

Petitioner's formulation of the first-filed rule would make this amendment meaningless. If petitioner is right,

¹⁶ Section 710 of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 264.

¹⁷ Sections 710(b) and (c) of Title VII of the 1964 Act, Pub. L. No. 88-352, 78 Stat. 264.

¹⁸ 29 U.S.C. 161(1), incorporated in 42 U.S.C. 2000e-9.

¹⁹ The legislative history of this amendment is sparse. However, it indicates that Congress intended to give the Commission more effective means of securing information in order to enhance its enforce-

employers would not only be free to bring the very action, under the authority of the Declaratory Judgment Act, that Congress withdrew under Title VII in 1972, but also could choose from a broader range of forums and could even secure the dismissal of any subsequent subpoena enforcement action filed in accordance with the procedure established by Title VII. The principle of comity surely cannot *require* a result so clearly at odds with the 1972 amendments to Title VII.

4. Petitioner does not dispute that its action included a request for an order quashing the Tung subpoena and was designed, in part, to secure a ruling on its defenses to that subpoena in a proceeding other than the Commission's imminent action to enforce. Nevertheless, it contends that because its action "was filed for purposes other than *just preempting* an enforcement proceeding" (Pet. Br. 31 (em-

ment of the Act. The Senate Committee Report stated (S. Rep. No. 415, 92d Cong., 1st Sess. 2 (1971)):

As a result of six years experience with title VII, and in order to accommodate the enforcement power provided for in this bill, a number of administrative changes are contained in S. 2515. They include expanded record-keeping requirements and subpoena power, authority for the Commission to conduct its own litigation, and additional protections for aggrieved persons.

The Commission's enhanced subpoena power was in keeping with the overall thrust of the legislation, which was to increase the effectiveness of the Commission. As the House Report explained (H.R. Rep. No. 238, 92d Cong., 1st Sess. 3 (1971)):

It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment.

See S. Rep. No. 415, *supra*, at 4-5.

phasis added)), the suit is not fairly described as preemptive. This exercise in semantics is beside the point. The reasons that require courts to respect the integrity of Title VII's enforcement procedures do not vanish simply because an employer joins additional claims to a request for an order quashing a Commission subpoena. Moreover, if those claims are defenses to the subpoena, they can and should be asserted in the subpoena enforcement proceeding. If they are not, as in this case (pp. 31-33, *infra*), they are immaterial to the subpoena's enforceability and should not impede the enforcement of the subpoena in the statutory proceeding Congress provided for that purpose.

B. Granting Priority To Petitioner's Preemptive Lawsuit Would Disserve Comity And Wise Judicial Administration

Even apart from Title VII, considerations of wise judicial administration and comity support the lower courts' refusal to dismiss this case in deference to petitioner's anticipatory lawsuit. Many courts have refused to apply a first-filed rule to a declaratory judgment action filed when a coercive suit was imminent.²⁰ Such preemptive

²⁰ *E.g.*, *Tempco Electric Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746, 749-750 (7th Cir. 1987); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 (5th Cir. 1983); *Ven-Fuel, Inc. v. Department of the Treasury*, 673 F.2d 1194 (11th Cir. 1982); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218-219 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Amerada Petroleum Corp. v. Marshall*, 381 F.2d 661, 663 (5th Cir. 1967); *Yoder v. Heinhold Commodities, Inc.*, 630 F. Supp. 756, 760-762 (E.D. Va. 1986); *Consolidated Rail Corp. v. Grand Trunk Western R.R.*, 592 F. Supp. 562, 567-570 (E.D. Pa. 1984); *State Farm Fire & Casualty Co. v. Taylor*, 118 F.R.D. 426, 430 (M.D.N.C. 1988). See also *National Emblem Ins. Co. v. Washington*, 482 F.2d 1346, 1348 (6th Cir. 1973).

Petitioner acknowledges the existence of these cases, but argues that they turned on "other considerations." Pet. Br. 34 n.33. In its view,

suits serve little useful purpose. Granting them priority encourages anticipatory filings, promotes conflicts among courts, and punishes responsible efforts to avoid litigation. Consequently, adherence to a first-filed rule in this context actually undercuts comity and wise judicial administration (see Pet. App. A18, A19). As the Seventh Circuit explained in dismissing a preemptive suit filed under circumstances similar to those of this case:

This circuit has never adhered to a rigid "first to file" rule. We decline * * * to adopt such a rule here. As we have noted before, "[t]he wholesome purpose of [the Declaratory Judgment Act] would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." * * *

Although a "first to file" rule would have the virtue of certainty and ease of application, * * * the cost—a rule which will encourage an unseemly race to the courthouse and, quite likely, numerous unnecessary suits—is simply too high.²¹

1. As the court of appeals recognized, these concerns are fully applicable to this case. Petitioner is "in the

the cases support the proposition that "the true anticipatory nature of a first-filed suit does not, without more, justify a departure from the first-filed rule" (*ibid.*). This reading of the cases is untenable. In each of them, it is clear that the court placed substantial weight on this factor.

²¹ *Tempco Elec. Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746, 750 (7th Cir. 1987) (quoting *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939)). Accord, *e.g.*, *Perez v. Ledesma*, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., dissenting) ("The federal declaratory judgment is not a prize to the winner of a race to the courthouse."); *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1164-1165 (10th Cir.), cert. denied, 456 U.S. 1007 (1982) (The Declaratory Judgment Act was not designed to be a "substitute for the rules of civil procedure" or "yet another weapon in a game of procedural warfare.").

position of one who desires an anticipatory adjudication, at the time and place of *its* choice, of the validity of the defenses it expects to raise against * * * claims it expects to be pressed against it." *Hanes Corp. v. Millard*, 531 F.2d 585, 592-593 (D.C. Cir. 1976). However, "[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse." *Ibid.* Comity does not require courts to encourage such filings.

This Court has made clear that a declaratory judgment is a discretionary remedy. *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 241 (1952). In determining whether to entertain a suit seeking such relief, a court may properly consider whether the issues in dispute will or can be resolved in a pending or foreseeable coercive suit, whether relief will serve the purposes of the Declaratory Judgment Act, and whether other interests of the judicial system will be harmed by proceeding with the action. See *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942). The exercise of discretion by the courts in which overlapping coercive and declaratory suits have been filed should not be replaced with a rigid first-filed rule.²² Any potential conflicts can be addressed through sensitivity to the interests at stake without an absolute rule of priority. See *Kerotest*, 342 U.S. at 185 ("apprehension [that] implies a lack of discipline and disinterestness on the part of the lower courts [is] hardly a worthy or wise basis for fashioning rules of procedure").

2. The judicial system's substantial interest in encouraging the settlement of disputes without litigation also

²² *Brillhart* implicitly rejected any rigid first-filed rule for declaratory judgment suits. See 6A J. Moore, *Moore's Federal Practice*, ¶ 57.08[6.-1], at 57-62 (1987).

supports denying priority to petitioner's District of Columbia action. Petitioner filed that action during a grace period that the Commission had extended to give it an opportunity to comply voluntarily with the subpoena. Making the order of filing controlling in this situation "reward[s] Pearl Harbor tactics at the expense of the Marquis of Queensberry rules." *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F. Supp. 563, 568 (S.D.N.Y. 1979).²³

The courts' general interest in promoting settlements is buttressed, in this case, by Title VII's policy of encouraging conciliation of disputes. See Pet. App. A19. In *Shell Oil Co.*, *supra*, all members of this Court recognized the importance that Congress attached to the voluntary resolution of disputes arising under this statute.²⁴ This policy is not limited to disputes over the merits of a charge of discrimination. The Commission relies heavily on voluntary compliance with its subpoenas. When the Commission denies an employer's application for revocation or

²³ See *Columbia Pictures Ind., Inc. v. Schneider*, 435 F. Supp. 742, 747-748 (S.D.N.Y. 1977) ("Potential plaintiffs should be encouraged to attempt settlement discussions (in good faith and with dispatch) prior to filing lawsuits without fear that the defendant will be permitted to take advantage of the opportunity to institute litigation in a district of its own choosing before plaintiff files an already drafted complaint.").

²⁴ 466 U.S. at 77-78 ("[W]hen it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the Act." Though that "hope proved overly optimistic, * * * Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation"); *id.* at 90 (O'Connor, J., concurring in part and dissenting in part) (noting that conciliation should be encouraged because the "Act's overriding goal is not to promote the employment of lawyers but correct discriminatory practices quickly and effectively").

modification of an EEOC subpoena, it routinely gives the employer a grace period to produce responsive information before initiating a subpoena enforcement proceeding. This obviously sensible practice would become untenable if an employer could obtain dismissal of the subpoena enforcement proceeding by filing a preemptive suit during such a grace period.

Neither comity nor sound judicial administration requires courts to apply a first-filed rule where, instead of mitigating conflicts between federal courts, it promotes anticipatory filings and discourages attempts to avoid litigation. The court of appeals was thus on strong ground when it concluded that "the principles underlying the first-filed rule" would be "better served by rejecting the University's effort to dismiss the second-filed suit" (Pet. App. A19).

C. The Court Of Appeals Properly Relied On The Fact That An Obvious And Admitted Objective Of Petitioner's Preemptive Suit Was To Avoid Unfavorable Federal Precedent

Petitioner contends that the court of appeals should not have relied on the fact that an admitted purpose of its District of Columbia suit was to avoid the Third Circuit's decision in *Franklin & Marshall*. Pet. Br. 23-30.²⁵ Relying principally on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235

²⁵ There is no doubt that avoiding *Franklin & Marshall* was a substantial factor in petitioner's choice of forum. During oral argument in the district court, counsel for petitioner acknowledged that "that may have been a consideration" that led to its filing in the District of Columbia. C.A. J.A. 56. In this Court, the University does not suggest otherwise. Rather, it argues that its reliance on this factor "is not objectionable" (Pet. Br. 27) and should have no weight when there are other considerations which arguably support its choice of forum (*id.* at 27-29).

(1981), petitioner argues that "[c]onsideration of applicable law simply has no role to play in the judicial administration calculus" (Pet. Br. 25). There is no merit to this rigid view of comity. In deciding whether to grant priority to an anticipatory lawsuit, a court may properly consider whether that suit is designed to displace a traditional plaintiff's choice of forum or to exploit perceived variations in the precedents in the circuits. Nothing in this Court's cases suggests otherwise.

In *Piper v. Reyno*, *supra*, the issue was whether plaintiffs in a tort action could avoid dismissal of their suit under the doctrine of *forum non conveniens* by demonstrating that an alternative forum would apply less favorable law to their claims. The Court held (*id.* at 247):

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

The Court did not hold that a court applying that doctrine may never consider a party's effort to obtain favorable law.²⁶ More important, however, the holding in *Piper* cannot fairly be applied to anticipatory suits. By concluding in effect that a natural plaintiff does not have

²⁶ *Id.* at 254. Moreover, the Court confirmed that the doctrine of *forum non conveniens* was designed for a situation in which "a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law." *Id.* at 249 n.15.

the unqualified privilege of choosing the law applicable to his claims, the Court was surely not adopting a rule that a natural defendant may exercise the privilege of choosing applicable law by filing an anticipatory suit. For instance, if a potential defendant in a tort suit initiated a preemptive action in a jurisdiction under which the potential plaintiff's cause of action would be barred, *Piper v. Reyno* could not possibly require a court hearing the tort plaintiff's subsequently filed suit to ignore the fact that the anticipatory action was designed to deny the natural plaintiff his choice of forum and extinguish his claim. See *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir.), cert. denied, 395 U.S. 959 (1969).²⁷ Many courts have recognized that the Declaratory Judgment Act was not intended to facilitate a natural defendant's attempt to secure a favorable forum for resolution of a dispute that will soon be made the subject of a coercive lawsuit.²⁸

²⁷ Similarly, in *Van Dusen v. Barrack*, 376 U.S. 612, 626-640 (1964), the Court construed 28 U.S.C. 1404(a) so that a transfer under that section would not result in a change in applicable law. The purpose of this holding was to permit transfers that facilitated the efficient disposition of lawsuits while preserving the "venue privilege" exercised by natural plaintiffs (*id.* at 627)—in that case, allowing the representatives of decedents to choose a forum in which their claims would not be barred by the statute of limitations. The Court's reasoning would not reach a situation in which the defendants in that case filed an anticipatory suit in a jurisdiction in which the suit would have been outside the period of limitations and asserted the "first-filed rule" as a bar to subsequent suits by the plaintiffs.

²⁸ See, e.g., *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177, 179 (2d Cir. 1969) (A "special circumstance[] justifying a departure from the 'first-filed' rule of priority . . . is where forum shopping alone motivated the choice of the situs for the first suit."); *Hanes Corp. v. Millard*, 531 F.2d 585, 592-593 (D.C. Cir. 1976) (anticipatory use of declaratory judgment process "deprives the plaintiff of his traditional choice of forum"); *Tempco Elec. Heater Corp. v.*

Similar considerations apply to attempts to displace Congress's choice of a forum for specific statutory actions. By refusing to grant priority to claims for anticipatory relief that are designed to avoid the law of a particular circuit, a court is not "necessarily and consciously favor[ing] one party (for whom the law of the forum is beneficial) over the other party" (Pet. Br. 26) or suggesting that a plaintiff cannot file suit in "the *most* appropriate forum . . . but instead must file in the forum where the plaintiff has the least chance of success—in order to escape a charge of 'forum shopping'" (Pet. Br. 28). Rather, that court is defending the useful predictability that flows from respecting Congress's choice of a forum for a particular type of suit and recognizing the weakness of an anticipatory plaintiff's claim to choose an alternative forum where the precedents may be more favorable. See *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), cert. denied, 372 U.S. 928 (1963) ("no litigant has a right to have the interpretation of one federal court rather than that of another determine his case").

The court of appeals properly placed some weight on these considerations in refusing priority to petitioner's action. It acknowledged that petitioner's attempt to avoid application of the *Franklin & Marshall* decision to this case, "standing alone," might be "insufficient to justify departure from the first filed rule." Pet. App. A17. However, it also recognized that petitioner's strategy "creates several problems that cannot be ignored" (*ibid.*),

Omega Engineering, Inc., 819 F.2d at 750 (declining to adopt "rigid 'first to file' rule" in part because "[t]he wholesome purpose of declaratory acts would be aborted by its use as an instrument . . . to choose a forum"); *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939) (forum shopping is abuse of declaratory judgment action).

including encouraging litigants opposing Commission subpoenas to flock to a particular circuit (*id.* at A17-A18). This degree of reliance on petitioner's obvious and acknowledged attempt to avoid *Franklin & Marshall* was entirely legitimate.²⁹

III. THE COURT OF APPEALS' DECISION CREATED NO RISK OF DUPLICATION OF JUDICIAL EFFORT OR INCONSISTENT JUDGMENTS AND DID NOT VIOLATE ANY OTHER CONSIDERATIONS OF WISE JUDICIAL ADMINISTRATION.

Petitioner also argues that its District of Columbia lawsuit was entitled to priority because that action was broader than the subpoena enforcement action and because allowing both suits to proceed would create a risk of inconsistent judgments. Pet. Br. 18-21. However, the District of Columbia action was broader than the enforcement proceeding only because it included claims—aimed at an allegedly unlawful Commission “rule”—that were no defense to the subpoena. There was no reason to dismiss or delay the Commission's statutory enforcement action pending resolution of those claims. Similarly, because the subpoena's enforceability would not be affected in any event by the existence or legality of the Commission's alleged absolute disclosure rule, there could be no meaningful inconsistency between a timely order enforcing the subpoena and any ruling that the District of Columbia might later issue with respect to any such “rule.”

²⁹ Even if it were not, reversal of the judgment would not be appropriate. The need to preserve the integrity of Title VII's enforcement procedures and well-established principles of judicial administration would require affirmance in any event.

A. Petitioner's Rulemaking Claims Were Irrelevant To The Enforceability Of The Tung Subpoena

As was noted above, Title VII itself grants the Commission access to “any evidence” that is “relevant to the charge under investigation” and the authority to issue a subpoena for “any evidence” that “relates to any matter under investigation.”³⁰ Thus, the Commission is not required to resort to rulemaking to establish its authority to secure relevant evidence. If information responsive to a subpoena is relevant and not privileged, *the Act itself* requires its production, and an order enforcing the subpoena must be entered.

In this regard, the statute draws no distinction between universities and any other employer. Though educational institutions were initially exempt from the provisions of Title VII, Congress withdrew that immunity in 1972.³¹ The Committee Report accompanying this legislation explained (H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971)):

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.³²

³⁰ 42 U.S.C. 2000e-8(a), 2000e-9 (incorporating 29 U.S.C. 161(1) (emphasis added)).

³¹ Section 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-104. Petitioner errs, therefore, in attributing the Commission's evenhanded enforcement of the statute to a Commission rule, rather than the statute itself. See Pet. Br. 3-4 n.1.

³² The report also noted that “particularly in institutions of higher education, women have been relegated to positions of lesser standing

In this case, the court of appeals found that the Commission had established its statutory entitlement to enforcement of its subpoena (Pet. App. A25). Under the Third Circuit's precedent and the facts of this case, it could reach no other conclusion. The Third Circuit's decision in *Franklin & Marshall* foreclosed recognition of any First Amendment privilege excusing production of the requested information.³³

Nor did petitioner argue that the information requested by the subpoena was irrelevant within the meaning of the statute as construed in *Shell Oil* (Pet. App. A24). Any such argument would have been untenable. Tung's charge alleged that the denial of her tenure was attributable in part to an unfairly derogatory letter authored by the Chairman of her Department. J.A. 28-29. Petitioner refused to produce that letter. C.A. J.A. 5. The charge also alleged that five male candidates for tenure whose qualifications were no better than Tung's had been treated more favorably than she was. J.A. 29. Petitioner refused to produce portions of their files. C.A. J.A. 8. Finally, petitioner argued that its peer review privilege should cover not only evaluations of Tung's scholarship by her reviewers, but also "documents reflecting the internal deliberations of faculty committees considering applications for tenure" (C.A. J.A. 9). Plainly, the Commission's

than their male counterparts" and that a study showed that while men were hired on the basis of "prestige and compatibility," "women were generally considered to be outside of the prestige system altogether." H.R. Rep. No. 238, *supra*, at 20.

³³ The Court's grant of certiorari does not include the question whether the First Amendment gives a university a privilege to withhold relevant information. For the reasons set forth in our brief in opposition (pp. 7-13), we believe that the Third Circuit has correctly refused to balance away the Commission's entitlement to peer review information when it is relevant to a charge under investigation.

statutory entitlement to "any relevant evidence" encompassed the contemporaneous documents from which it could determine whether the non-discriminatory reasons that had been advanced as justifications for denying Tung tenure were the real reasons for that decision.³⁴

When it denied petitioner's application for modification of its subpoena, the Commission carefully articulated its need for the documents responsive to the subpoena.³⁵ Under these circumstances, the existence or legality of any "rule" of the type that is in issue in the District of Columbia was completely irrelevant to the enforcement of the subpoena.

³⁴ Even those courts that have adopted a "balancing approach" to discovery in private actions under Title VII have granted discovery of peer review materials when, as in this case, a university relies on alleged deficiencies in the tenure candidate's scholarship to deny tenure. See *Gray v. Board of Higher Education*, 692 F.2d 901, 908-909 (2d Cir. 1982); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1347-1348 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982). In discharging its statutory mandate to investigate charges of discrimination, the Commission must be allowed to examine a university's deliberations with respect to an application for tenure for signs of bias, prejudice, and stereotypes. *EEOC v. Tufts Institution of Learning*, 421 F. Supp. 152, 159-161 (D. Mass. 1975). Such investigations do not involve second-guessing legitimate academic judgments; the Commission does not sit as a "Super-Tenure Review Committee." *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980). At the same time, "an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation." *Franklin & Marshall College*, 775 F.2d at 116.

³⁵ The Commission stated (Pet. App. A30, A31-A32):

The information is necessary in order to determine whether Ms. Tung was treated differently than those who received tenure.
* * *

There has not been enough data supplied in order for the Commission to determine whether there is reasonable cause to believe

B. There Was No Reason To Require The Subpoena's Enforceability To Be Determined In The Same Action As Petitioner's Separable Rulemaking Claims

Contrary to petitioner's argument, the lower courts' decision to proceed in this case did not create any risk of inconsistent judgments, duplication of effort, or piecemeal litigation. Pet. Br. 18-21. These considerations thus did not require the lower courts to withhold the narrow rulings they were authorized to make under Title VII.

1. Enforcement of the subpoena created no risk of inconsistent judgments. The lower courts in this case expressed no opinion on the existence or validity of any rule issued by the Commission.³⁶ Accordingly, the District of Columbia courts remain free to adjudicate the legality of the Commission's rules and to issue any appropriate judgments addressed to them without interference from the lower courts in this case. Because the existence and

that the allegations of sex, race and national origin discrimination is true. The Commission is mandated by statute to investigate charges of alleged discrimination. The Commission would fall short of its obligation if it stopped its investigation once a Respondent has . . . provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination.

³⁶ In fact, the Commission vigorously denies that any such "rule" exists. In a series of individual cases, the Commission has refused to withdraw or modify requests for relevant information on the basis of the "peer review" privilege or balancing approach that some universities have advocated. Its position, which is fully consistent with the law and common sense, is that it cannot be required to conduct an APA rulemaking before adjudicating defenses that are inconsistent with its statutory entitlement to relevant evidence. See Pet. Br. 3-4 n.1. In any event, these issues are before the District of Columbia courts. It would thus be inappropriate for this Court to accept petitioner's invitation to assume the correctness of its position on the existence and effect of any alleged "rule" as the basis for a decision in this case. See, e.g., Pet. Br. 3.

legality of any alleged Commission rule was wholly irrelevant to enforcement of the subpoena, there would be no meaningful inconsistency between an order enforcing the subpoena and any conclusion that the District of Columbia court might reach. As for the Tung subpoena, unless the lower courts' order is reversed, the doctrines of collateral estoppel and res judicata will preclude the entry of an order by another court quashing the subpoena. Thus, neither of the parties in this action runs any risk of being subject to conflicting obligations arising from judgments in these two cases.³⁷

2. The division of labor that has resulted from the lower courts' enforcement of the Tung subpoena involves no duplication of judicial effort. The District of Columbia court need not concern itself with the particulars relevant to the enforceability of the Tung subpoena. On the other hand, the lower courts in this case correctly determined that they need not reach the questions whether the Commission has or has not adopted a rule of the sort attributed to it by petitioner and whether any such rule would be enforceable. All of the discovery and other proceedings relevant to that claim have been confined to the District of Columbia.

3. The usual preference for the "comprehensive disposition of litigation" has no force in this case (Pet. Br. 18-21). Even if the "whole of the war"³⁸ that petitioner

³⁷ In its brief, petitioner suggests that the court of appeals concurred in its argument that a judgment in its favor on its rulemaking claim would be inconsistent with a judgment enforcing the subpoena (Pet. Br. 9-10, 21). In fact, the court of appeals only took note of that argument, before dismissing any apparent anomaly as a problem "of the University's own making" (Pet. App. A8-A9).

³⁸ Pet. Br. 19 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. at 183). *Kerotest*, of course, does not suggest that the more comprehensive suit must be given priority in every case. In *Kerotest*, the Third Circuit was presented with a choice between hav-

would prefer to litigate is in the District of Columbia, there is no good reason to make Rosalie Tung's charge a hostage for the duration. As petitioner aptly points out, three years after its complaint was filed, its District of Columbia action "has continued to plow forward to decision on the myriad questions not presented by the more limited enforcement action" (Pet. Br. 20). There is absolutely no reason why the Commission's investigation or its reasonable cause determination on Tung's allegations should await the final outcome of those "myriad claims." It would have been an abuse of discretion—as well as a violation of principles of wise judicial administration and the enforcement scheme of Title VII—to dismiss this summary subpoena enforcement action with a view to having a determination on the enforceability of the subpoena await the time when petitioner's separable and immaterial rulemaking claims were ripe for decision.³⁹

ing the validity of certain patents resolved in (1) a single action in which the patent owner, the manufacturer of allegedly infringing products, and a distributor of those products were all present and (2) separate suits between the patent owner and the distributor and the patent owner and the manufacturer. The prospect of inconsistent judgments and duplication of effort and the advantages of the more comprehensive suit in that situation were self-evident. This case presents no comparable choice.

³⁹ Petitioner argues, in passing, that the judgment should be reversed because the district court failed to articulate a proper reason for denying the motion to dismiss and because the court of appeals "supplied the missing statement of reasons." Pet. Br. 22 & n.17. However, any procedural shortcoming in the district court's disposition of petitioner's motion to dismiss would not justify returning this case to the district court for another round of litigation. The court of appeals was in as good a position as the district court to consider the factors relevant to the disposition of this case—i.e., the procedures and policies of Title VII, the separability of issues relating to the Tung subpoena and petitioner's rulemaking claims, the anticipatory nature

IV. THE COURT SHOULD NOT ADOPT A PROCEDURAL RULE THAT REQUIRES THE COMMISSION TO ESTABLISH THE PROPER VENUE FOR A SUBPOENA ENFORCEMENT ACTION IN A FORUM IN WHICH AN ANTICIPATORY SUIT HAS BEEN FILED

Petitioner urges the Court to adopt a "clear rule" that the court in which the first of two overlapping actions is filed must determine which of the two should proceed. Pet. Br. 36-40. Under this "procedural" version of the first-filed rule, once a party files an action, its opponent must present all of its claims on the merits as counterclaims and challenge the legitimacy of the forum

of petitioner's suit, and petitioner's apparent effort to avoid Third Circuit precedent. Further, the district court unquestionably had jurisdiction to decide the merits of this case and discretion to proceed, so it would be an unjustifiable waste of resources to remand for a statement of reasons. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126 (1968); *Church of Scientology of California v. United States Dept. of the Army*, 611 F.2d at 750.

Similar considerations should govern this Court's review. The question before this Court is whether an order enforcing a subpoena, based upon findings that responsive information is relevant and unprivileged, issued by courts empowered by Title VII to make those determinations, should be vacated so that there can be more litigation on the same issues in the same or different courts. There is no reason to require that result in the absence of a showing that a serious error has been made. That was the standard that this Court applied in *Kerotest* (342 U.S. at 184):

Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours.

Petitioner is not prejudiced in any cognizable sense by enforcement of the subpoena in the venue prescribed by Title VII, and a remand on procedural grounds would only further delay the disposition of Tung's charge, a point that should not be overlooked.

through motions made in that action. See Pet. Br. 38-39. If, instead, it files a second action, the court in that action must dismiss the complaint or stay its proceedings until the first court rules on where the parties' dispute will be resolved. Whatever its merits as a means of addressing multi-sided patent or commercial litigation—the subject of all of the cases cited in petitioner's brief (Pet. Br. 37-38 & nn. 34-35)—this procedural rule is just as direct a threat to the Commission's enforcement of Title VII as the substantive version of the first-filed rule advocated elsewhere in petitioner's brief. In fact, upon examination, that "procedural" rule would be even more rigid and mechanical, and thus even less supportable, than its substantive counterpart.

The application of the "procedural" version of petitioner's first-filed rule to the facts of this case illustrates the point. Under that rule, once petitioner had filed its preemptive action, the district court in the Eastern District of Pennsylvania would have been obligated to dismiss or stay the Commission's summary enforcement action automatically. It would not have been entitled to pause even to address the considerations of wise judicial administration that petitioner recognizes are appropriate subjects of judicial concern. To be sure, this dismissal would have been accompanied by an explanation that the appropriate procedure for obtaining enforcement of the subpoena in the forum Congress prescribed would be to file a counterclaim in the District of Columbia and then seek a transfer of that action back to the Eastern District of Pennsylvania. The injury that such a rule would inflict on the Commission's ability to enforce Title VII is obvious. In place of a certain and summary action in the forum that Congress provided for enforcement of its subpoenas, the Commission would be left with a circuitous procedural path necessarily winding through a forum of

petitioner's choice.⁴⁰ For the same reasons discussed at length above, comity cannot justify placing this procedural superstructure on the subpoena enforcement procedure prescribed by Title VII. See pp. 14-22, *supra*.⁴¹

The "complicated problems for coordinate courts" (*Kerotest*, 342 U.S. at 183) that arise from attempts to invoke anticipatory remedies cannot be made to disappear

⁴⁰ In this case, moreover, by the time the Commission filed this subpoena enforcement action, it had filed a motion to dismiss the District of Columbia suit. Thus, application of the petitioner's "clear rule" would have required the Commission to mark time while it waited for the District of Columbia's ruling on that motion before it could have filed its application to enforce the subpoena as a counterclaim.

EEOC subpoena enforcement proceedings are not governed by the ordinary pleading requirements applicable to civil actions. *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d at 308-309. For instance, those proceedings are initiated, as in this case, by an application for an order to show cause, not a complaint. *Bay Shipbuilding* also indicated that the counterclaim provisions of Fed. R. Civ. P. 13 are not applicable. *Ibid*. For this reason, as well as to avoid undercutting Title VII, the Commission's application for enforcement was not a compulsory counterclaim in the District of Columbia action. See *Foreman v. Thalmayer*, *supra*.

⁴¹ Finally, even if the Court were to favor the rule that petitioner has suggested, this would not be a case in which to apply it. In its reply brief in the court of appeals, petitioner argued that the Commission should have filed its application to enforce the Tung subpoena as a compulsory counterclaim. Pet. C.A. Rep. Br. 2 n.2, 13-14. See also C.A. J.A. 12-13 (presenting same argument to district court). However, it did not articulate the rule it now urges on this Court—i.e., that the court of appeals should have directed dismissal of the suit without even making the discretionary judgment referred to in *Kerotest* and its progeny. Petitioner also did not refer the court of appeals to any of the authorities that are presented as support for this rule in its brief in this Court. It would be inappropriate to roll back all of the proceedings below on the basis of a rule that had not previously been applied in the Third Circuit and was not presented to that court. See *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

with petitioner's deceptively simple procedural rule. Regardless of whether the problems arising from overlapping suits are framed in substantive or procedural terms, courts will have to proceed with sensitivity to the claims in issue, the interests implicated by any statutes involved, and the prerogatives of coordinate courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

THOMAS W. MERRILL
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

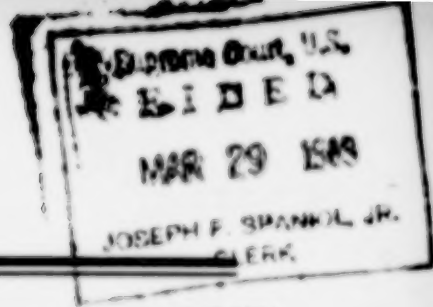
LORRAINE C. DAVIS
Assistant General Counsel

HARRY F. TEPKER, JR.
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

FEBRUARY 1989

REPLY BRIEF

(9)
No. 88-493



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:

SHELLEY Z. GREEN
NEIL J. HAMBURG
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

STEVEN B. FEIRSON
(Counsel of Record)
ALAN D. BERKOWITZ
NANCY J. BREGSTEIN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Petitioner

March 29, 1989

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. INSTEAD OF FILING A DUPLICATIVE ACTION, THE COMMISSION SHOULD HAVE COUNTERCLAIMED FOR ENFORCEMENT IN THE DISTRICT OF COLUMBIA AND, IF IT OBJECTED TO THAT FORUM, MOVED FOR TRANSFER	3
II. EEOC ENFORCEMENT ACTIONS ARE NOT EXEMPT FROM THE USUAL RULES OF COMITY	6
A. The EEOC Does Not Have The Exclusive Right To Bring Actions Relating to Subpoena Enforcement	6
B. Application of the First-Filed Rule Would Have An Insignificant Effect, If Any, on the Commission's Ability To Enforce Subpoenas	8
III. ADHERING TO THE FIRST-FILED RULE IN THIS CASE WOULD NOT UNDERCUT COMITY OR WISE JUDICIAL ADMINISTRATION	12
A. The University's Action Was Not Preemptive And Did Not Foreclose Conciliation Efforts Since Litigation Could Not Have Been Avoided In Any Event	12
B. Either Party's Desire To Avoid Or Avail Itself Of Third Circuit Precedent Was Not A Relevant Consideration	14
C. Proceeding With The Enforcement Action Created A Substantial Risk Of Inconsistent Judgments And Conflicting Results	16
1. <i>First Amendment</i>	16
2. <i>Administrative Procedure Act</i>	17
3. <i>Need for comprehensive resolution</i>	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	8
<i>Allen v. State Board of Elections</i> , 393 U.S. 544 (1969)	6
<i>American Motors Corp. v. FTC</i> , 601 F.2d 1329 (6th Cir. 1979), <i>cert. denied</i> , 444 U.S. 941 (1979)	8
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1976)	6
<i>Consolidated Rail Corp. v. Grand Trunk Western R.R.</i> , 592 F. Supp. 562 (E.D. Pa. 1984)	13
<i>EEOC v. A.E. Staley Mfg. Co.</i> , 711 F.2d 780 (7th Cir. 1983), <i>cert. denied</i> , 466 U.S. 936 (1984)	11
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984), <i>rev'g</i> 676 F.2d 322 (8th Cir. 1982), <i>rev'g</i> 523 F. Supp. 79 (E.D. Mo. 1981)	11, 12, 14
<i>EEOC v. Bay Shipbuilding Corp.</i> , 668 F.2d 304 (7th Cir. 1981)	4, 9, 11
<i>EEOC v. South Carolina National Bank</i> , 562 F.2d 329 (4th Cir. 1977)	9, 11
<i>EEOC v. Tempel Steel Co.</i> , 814 F.2d 482 (7th Cir. 1987)	9, 11
<i>EEOC v. University of Pittsburgh</i> , 643 F.2d 983 (3d Cir.), <i>cert. denied</i> , 454 U.S. 880 (1981)	11
<i>FTC v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980)	8
<i>General Electric Co. v. FTC</i> , 411 F. Supp. 1004 (N.D.N.Y. 1976)	4
<i>Hospah Coal Co. v. Chaco Energy Co.</i> , 673 F.2d 1161 (10th Cir. 1982), <i>cert. denied</i> , 456 U.S. 1007 (1982)	5
<i>Independent U.S. Tanker Owners Comm. v. Lewis</i> , 690 F.2d 908 (D.C. Cir. 1982)	18, 19
<i>Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.</i> , 342 U.S. 180 (1952)	9
<i>NLRB v. Wyman-Gordon Co.</i> , 394 U.S. 759 (1969)	18, 19
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981) ..	15
<i>Reisman v. Caplin</i> , 375 U.S. 440 (1964)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>State Farm Fire & Cas. Co. v. Taylor</i> , 118 F.R.D. 426 (M.D.N.C. 1988)	13
<i>Stewart Organization, Inc. v. Ricoh Corp.</i> , 108 S.Ct. 2239 (1988)	15
<i>Toilet Goods Ass'n v. Gardner</i> , 387 U.S. 158 (1967)	8
<i>United States v. Taylor</i> , 108 S. Ct. 2413 (1988)	17
<i>Wearly v. FTC</i> , 616 F.2d 662 (3d Cir. 1980), <i>cert. denied</i> , 449 U.S. 822 (1980)	4, 8, 13
<i>William Gluckin & Co. v. International Playtex Corp.</i> , 407 F.2d 177 (2nd Cir. 1969)	15
<i>Constitutional Provisions, Statutes, and Rules:</i>	
U.S. Const., Amend. I	<i>passim</i>
Article I, § 8	9
Administrative Procedure Act, 5 U.S.C. § 551 <i>et seq.</i>	<i>passim</i>
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e <i>et seq.</i>	<i>passim</i>
Declaratory Judgment Act, 28 U.S.C. § 2201	<i>passim</i>
28 U.S.C. § 1404	4, 5
29 U.S.C. § 161	7
Fed. R. Civ. P. 13	4, 5
<i>Other Authorities:</i>	
Ely, <i>The Irrepressible Myth of Erie</i> , 87 Harv. L. Rev. 693 (1974)	15
Marcus, <i>Conflicts Among Circuits and Transfers Within the Federal Judicial System</i> , 93 Yale L.J. 677 (1984)	15

REPLY BRIEF FOR PETITIONER

If the Commission had observed the usual rules of procedure rather than instituting a duplicative action, all the issues raised by its subpoena would have been long since resolved. That resolution would have vindicated the policies underlying Title VII in a speedy manner with the least diversion of Commission resources. That resolution also would have avoided the need for a multitude of federal courts to spend time and effort considering "overlapping" questions.

The Commission elected to follow a different course, however, and now argues that having two actions proceed simultaneously was unobjectionable, and, indeed, actually served the interests of sound judicial administration. See Resp. Br. 9, 13. The Commission attempts to justify the maintenance of its duplicative action by asserting that the application of normal rules of comity to it somehow would impair its ability to enforce subpoenas in Title VII investigations.

The speed with which a subpoena dispute can be resolved, however, does not depend on the form of the action in which the issue is presented or the location of the court that hears it. As the Court of Appeals held in this case, and as the Commission concedes, objections to subpoena enforcement must be litigated and decided before enforcement can be ordered. Thus, it makes little difference whether that adjudication takes place in the context of a declaratory judgment or an enforcement action. And it makes no difference which court hears those issues.

The Commission repeatedly describes the University's action as "preemptive," and claims that giving that action priority fosters forum shopping and discourages the settlement of disputes without litigation. These arguments ignore the fact that the University's action was not a reaction to a single subpoena regarding one isolated tenure dispute. Rather, it was an appropriate re-

sponse to a long-standing and far-reaching controversy between the Nation's academic community and the Commission, which has resulted in a substantial conflict in the Circuits on an important constitutional question. The University's action was an attempt to resolve this battle in a comprehensive fashion, rather than continuing to engage in endless skirmishing. This was not, and has not been, a dispute that could be settled without litigation.

Finally, the Commission argues that there is no risk here of inconsistent judgments or conflicting results. It claims that even if the University were to prevail in the District of Columbia court on its claim that the Commission's peer review disclosure rule violates the APA, such a holding would not affect or be inconsistent with the order of the District Court below enforcing the subpoena. The Commission is demonstrably wrong on this point under precedents of this Court and the Court of Appeals for the District of Columbia Circuit, which hold that if a subpoena is the tainted by-product of an invalid rule, it cannot be enforced. Moreover, the District of Columbia court also is considering the University's argument that the Commission's peer review policy, on which the subpoena in this case was based, violates the First Amendment. Should that court find that the Commission's refusal to recognize any protection for academic peer review materials is a violation of the First Amendment, then a conflict would exist between that determination and the ruling below enforcing the *Tung* subpoena, issued pursuant to that same rule.

We first address the Commission's response to our straightforward contention that two district courts should not have been asked to decide these procedural issues at the same time.

I. INSTEAD OF FILING A DUPLICATIVE ACTION, THE COMMISSION SHOULD HAVE COUNTERCLAIMED FOR ENFORCEMENT IN THE DISTRICT OF COLUMBIA AND, IF IT OBJECTED TO THAT FORUM, MOVED FOR TRANSFER.

Though the Commission agrees that in the federal courts "the general principle has been to avoid duplicative litigation" (Resp. Br. 8), it nevertheless seeks to have the duplication of effort and ensuing tension between two federal district courts countenanced in this case. Indeed, the Commission terms the two actions here "overlapping" rather than "duplicative" (*e.g.*, Resp. Br. 8-9, 11), as if that made the situation less troublesome. But the Commission never successfully explains what is so exceptional about this case to warrant a departure from the long-standing and salutary rule against duplicative litigation in the federal courts.

Once duplicative actions have been filed, there is no easy solution to the problems thereby created. It is for this reason that the decision whether to proceed has been left to the sound discretion of the district courts, guided by the time-tested considerations outlined in the University's opening brief. However, if each of the two district courts in which duplicative litigation has been filed is free to reach its own decision as to whether to go forward, there is always a chance that a conflict like the one in this case will result. In the meantime, the judgment of not one but two district courts is called into question, and there is no resolution of the merits of the underlying dispute while the appellate processes run their course.

With these considerations in mind, the recent trend in the district courts has been voluntarily to avoid even the possibility or appearance of conflict with another federal court. These courts have followed a self-imposed rule of judicial restraint under which they defer to the first court on the question whether the action in that court will proceed, be dismissed, or be transferred to the second court. See Pet. Br. 36-38 & nn. 34 & 35. If fol-

lowed uniformly, such a practice would deter the filing of duplicative actions, since the defendant in the first action would have no incentive to file a duplicative action rather than make its objections to the first suit (or the first forum) in that forum. The benefits of this rule are obvious, and it has no disadvantages in terms of fairness or efficiency to either the courts or the litigants. The University respectfully submits that the Court should endorse such a rule for the district courts.

The Commission does not dispute that this has become the uniform procedure in the district courts; nor does it voice any criticism of this general rule. It merely says that the application of the rule to the Commission in this case would constitute a "direct . . . threat to the Commission's enforcement of Title VII." Resp. Br. 38. However, the Commission never explains why it was such a threat in this case, or would be in others, to proceed in one court rather than two. The Commission should have counterclaimed for enforcement, under Rule 13 of the Federal Rules of Civil Procedure, and advocated summary enforcement in the District of Columbia court.¹ If the Commission did not want the merits of the action decided in the District of Columbia forum, it could have moved for dismissal or transfer.² It is difficult to understand how availing itself of the protections thus afforded by § 1404

¹ See *Wearly v. FTC*, 616 F.2d 662, 664 n.1 (3d Cir. 1980). Notwithstanding the Commission's suggestion (Resp. Br. 39 n.40), *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304 (7th Cir. 1981), is not to the contrary. *Bay Shipbuilding* held that an employer did not have the right to assert defenses to a subpoena as a counterclaim in an enforcement proceeding, where the employer's objections were already in the record. See 668 F.2d at 309. The decision has no bearing at all on the Commission's ability or obligation to counterclaim for enforcement in a declaratory action initiated by an employer.

² The Commission notes with apparent approval that in *General Electric Co. v. FTC*, 411 F. Supp. 1004 (N.D.N.Y. 1976), "the district court hearing the anticipatory suits ordered them transferred to the District of Columbia, where the enforcement proceeding was pending." (See Resp. Br. 16 n.12.)

and the Rules of Civil Procedure could constitute a "threat" to the enforcement of Title VII. What the Commission should not have done was to side-step these available procedures by starting a new action in another federal court.

Thus, contrary to the Commission's argument, the "circuitous procedural path" was not through the District of Columbia (Resp. Br. 38), but rather through the thicket of redundant, wasteful, and potentially conflicting proceedings in this case.³ As the Tenth Circuit stated in *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1164 (10th Cir. 1982), a duplicative action "cannot be used as a substitute for the rules of civil procedure"⁴

³ The Commission's leisurely pace before the forum dispute arose also belies its current emphasis on speed and efficiency. Ms. Tung's charge was filed on August 14, 1985. It took the Commission more than a year, until September 19, 1986, to issue a subpoena. Then the University was given but five days to make objections. The Commission then took six months, until March 27, 1987, to rule on the University's objections. The Commission did not file its enforcement action until June 18, 1987, almost two years after the filing of the charge.

⁴ The Commission argues that this rule of deference should not be applied in this case, on the asserted ground that the University did not make this argument below. See Resp. Br. 39 n.41. But the University clearly argued below that the enforcement action should have been stayed or dismissed out of deference to the District of Columbia court, which was then considering the Commission's motion to dismiss. As the Commission acknowledges (Resp. Br. 39 n.41), the University argued below that the Commission should not have filed a duplicative action but rather should have counterclaimed for enforcement in the District of Columbia. Moreover, the alternative of presenting a transfer motion to the District of Columbia court, pursuant to § 1404(a), was discussed below. Indeed, the Court of Appeals stated that it was "puzzled by the EEOC's failure to move for transfer" in the District of Columbia court. See Pet. App. A-14 n.4. See also Tr. of Oral Arg., No. 87-1547, at 33, 35, 37, 51 (3d Cir., Feb. 25, 1988).

Thus, the courts below fully understood that the issue before them was not only whether the enforcement action should be dismissed to have the merits decided in the District of Columbia, but also whether the enforcement action should not go forward at least until the court in the District of Columbia could rule on the

II. EEOC ENFORCEMENT ACTIONS ARE NOT EXEMPT FROM THE USUAL RULES OF COMITY.

The Commission seeks to justify the allowance of duplicative litigation in this case primarily on account of an asserted "need to preserve the integrity of the procedures Congress created to enforce Title VII" Resp. Br. 13. But those procedures, which the University respects, are not the exclusive or even necessarily the best means of resolving disputes concerning aspects of those procedures, and the Commission's unyielding insistence on rigid adherence to its preferred procedures actually dis-serves the enforcement of Title VII.

We show here that the Commission does not have the exclusive right to bring disputes relating to subpoena enforcement to the federal courts; that the University's declaratory judgment action, which survived the Commission's motion to dismiss, was not a preemptive mirror-image version of the Commission's later enforcement action; and that the application of normal rules of comity to prevent the Commission from filing a duplicative action would not impair the Commission's ability to enforce its subpoenas in any significant way.

A. The EEOC Does Not Have The Exclusive Right To Bring Actions Relating To The Issuance Of Subpoenas.

The Commission makes two arguments to justify a special exemption for its enforcement actions from generally applicable principles of judicial administration and procedure. First, the Commission argues that pre-enforcement review of administrative subpoenas is not allowed, citing *Reisman v. Caplin*, 375 U.S. 440 (1964), and its progeny. See Resp. Br. 14-15 & nn. 10 & 11. Second, relying on the 1972 amendment of Title VII,

pending motion to dismiss or until the Commission exercised its right to move for transfer. This same issue, in both its aspects, is now before this Court, and there is no reason why the Court cannot consider both aspects of the University's argument. See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544, 553-54 (1969); *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976).

the Commission asserts that the University's declaratory judgment action interferes with the statutory scheme that gave the Commission its subpoena authority. Resp. Br. 20-21.⁵

But neither the *Reisman* line of cases nor the statute authorizing Commission requests for judicial enforcement of subpoenas is relevant to the action brought by the University. Even though the Commission insists on characterizing the University's declaratory judgment action as a mirror image of the Commission's subpoena enforcement action (e.g., Resp. Br. 18, 20-22), the University's action was addressed in the main to the Commission's unlawful rule, and challenged the particular subpoena in the *Tung* investigation only as part of a much larger controversy. The University did not rely (or need to rely) on Title VII for jurisdiction, venue, or a cause of action, which were based on the Constitution, the APA, and supporting federal question jurisdictional and venue provisions. See J.A. 5 (University's complaint). Nothing in Title VII nor the legislative history of the 1972 amendment, quoted by the Commission (Resp. Br. 20 n.19), prohibits the University from bringing its constitutional or APA challenges; and the Commission cites no other authority in support of its contrary assertions.

What is more, the Commission does not argue in this Court that the District of Columbia action should not go forward; after all, it failed in its attempt to have the

⁵ The Commission also notes that an enforcement action can be brought only where the employer resides, is found, or transacts business, see 29 U.S.C. § 161(2), whereas the employer could choose from a "broader range of forums" for a declaratory judgment action. Resp. Br. 21. While this may be true, it is unobjectionable. Congress limited the venue choices for an agency enforcement action for the benefit of the employer subject to the subpoena, not the Commission. If an employer waives that protection and brings a different action where venue is proper (for example, in the Commission's own backyard), the Commission has no basis for complaint. See Pet. Br. 26 n.23.

University's action dismissed on essentially the same grounds now reiterated in this Court.⁶ The University demonstrated to the District Court, among other things, that its action raised issues going beyond the isolated *Tung* subpoena. In denying the Commission's motion to dismiss, the District of Columbia court necessarily agreed with the University that its use of the declaratory judgment procedure under these circumstances was entirely appropriate. See Pet. Br. 26. That judgment is not before this Court for review. Since the propriety of the University's declaratory judgment action must therefore be assumed, there is no point to the Commission's rehashing of these arguments in this Court.

B. Application of the First-Filed Rule Would Have An Insignificant Effect, If Any, on the Commission's Ability To Enforce Subpoenas.

The Commission argues that its ability to enforce subpoenas under Title VII should be taken into account, either to justify an exception to the generally applicable rules of comity or as part of a court's consideration of sound judicial administration.⁷ However characterized,

⁶ In its motion to dismiss the University's declaratory judgment action, the Commission argued that venue was improper in the District of Columbia, on the ground that it was not one of the places specified in Title VII for enforcement of subpoenas (C.A. App. 222-224); that the University could not base jurisdiction for its action on the federal question jurisdictional provisions on which it relied, and that jurisdiction did not lie under Title VII (*id.* 224-226); and, finally, that the action was premature and not ripe for review, since the Commission would have to apply to a court for enforcement of its subpoena. (*Id.* 226-229.) In support of this last argument, the Commission relied on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *Federal Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *American Motors Corp. v. FTC*, 601 F.2d 1329, 1338 (6th Cir. 1979); and *Wearly v. FTC*, 616 F.2d 662 (3d Cir. 1980). Compare cases cited at Resp. Br. 15 nn. 10 & 11.

⁷ The Commission seems to be arguing for an exception to the usual comity rules, since we know of no cases—and the Commission

the argument has no substance. While the Commission says that subpoena enforcement proceedings are meant to be "summary,"⁸ the fact remains that how quickly subpoena disputes are resolved will depend on the issues to be adjudicated, not on which party initiates the action or on which court hears it.⁹ If the Commission can show

has cited none—in which a factor like this has been identified as an aspect of judicial administration. Moreover, the Commission has provided no authority for the proposition that its obligation to enforce Title VII should have greater weight in considering the proper functioning of the federal courts than the obligations of other agencies charged with enforcing other statutes, or than the rights of private parties to enforce rights created by federal statutes. Thus, for example, we have not seen any mention of special priority for suits by patent-holders to enforce their patents, which are created by federal statute and endorsed by Article I, § 8 of the Constitution, over actions seeking declarations of non-infringement. See *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 185 & n.4 (1952) (and cases cited therein).

⁸ The cases cited by the Commission regarding the summary nature of enforcement proceedings (see Resp. Br. 18 n.14) generally involve the assertion of defenses considered inappropriate because they do not relate specifically to the demands of the subpoena. See, e.g., *EEOC v. Tempel Steel Co.*, 814 F.2d 482 (7th Cir. 1987) (issue of timeliness of the charge filed with the agency); *EEOC v. South Carolina National Bank*, 562 F.2d 329 (4th Cir. 1977) (same). *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 308 (7th Cir. 1981), merely held that the employer's defenses could be resolved on the record before the district court, without a need for the employer to file an "answer" or "counterclaim".

⁹ EEOC subpoenas are not self-enforcing. Rather, the agency must seek enforcement by a district court. In creating this scheme, Congress must have expected that some subpoenaed parties would challenge those subpoenas and that the courts would review them. The statutory procedure simply is not consistent with the Commission's view that all objections to subpoenas should be given short shrift in a "summary proceeding."

The Commission's dire prediction of a barrage of anticipatory actions brought by employers "to delay the Commission's investigations" (Resp. Br. 18-19) is dramatically overstated. As the Commission itself points out, "[m]ost employers comply voluntarily with subpoenas." Resp. Br. 19 n.15. The Commission asserts that this is "no doubt in part because of the courts' unwillingness to

that an action is premature, it will be dismissed. See Resp. Br. 14-15 & n.11. If an employer's objections to enforcement are inappropriate, frivolous, or otherwise easily dispensed with, the proceeding will terminate quickly—whether it is an enforcement action brought by the Commission or a declaratory action brought by the employer, in which the Commission has counter-claimed for enforcement.

On the other hand, an employer can and will assert substantial good faith objections to enforcement of a subpoena, like the statutory and constitutional issues in this case, as vigorously in an enforcement action as it would in a declaratory action. The Commission acknowledges in this Court that such objections "can and should be asserted in the subpoena enforcement proceeding" (Resp. Br. 22), and the Court of Appeals correctly held that the University's First Amendment claims should not have been dismissed summarily. As we show at pp. 17-19 below, the same is true for the University's APA arguments.¹⁰ Thus, there is nothing inherent in a subpoena enforcement action or a declaratory judgment action that ineluctably speeds it up or slows it down, thereby enhancing or impairing the Commission's enforcement capabilities.¹¹

allow delay in subpoena enforcement actions." *Id.* This is, of course, mere supposition on the Commission's part. It is just as likely that in cases of voluntary compliance, the employer has made a determination that the subpoena is legally unobjectionable.

¹⁰ The only reason that the enforcement proceeding in this case ended so quickly was that the Commission convinced the District Court to bar the University's assertion of its objections. The Commission argued below that "the only two defenses" that could be raised in a subpoena enforcement proceeding were that the "evidence requested is outside the agency's jurisdiction or that the evidence sought is not relevant" (C.A. App. 96.) The District Court agreed and ruled that the University could not raise its constitutional or APA arguments as defenses to enforcement. (Pet. App. A-34.)

¹¹ Even supposedly "summary" enforcement proceedings are not necessarily "quickly brought and just as quickly ended." Resp.

Moreover, the Commission appears to have come only recently to the conviction that its enforcement ability will be impaired by its submission to general rules of procedure and comity. As the Commission acknowledges (Resp. Br. 17 n.13), *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), began as a declaratory judgment action by Shell in the Eastern District of Missouri. The Commission subsequently filed an enforcement action in the Southern District of Illinois. Without opposition from the Commission, its enforcement action was transferred and consolidated with the first-filed declaratory action.¹² The Commission's motion to dismiss Shell's action—on grounds of lack of jurisdiction, failure to state a claim, and prematurity¹³—subsequently was denied.

The Commission voiced no complaint, in either the Court of Appeals or this Court, about having litigated its request for enforcement as part of the employer's larger challenge to the Commission's subpoena enforcement policies. Nor, as noted above, did it oppose the transfer of its action to be consolidated with the employer's action. It therefore is disingenuous for the Commission now to impute such large significance to the form of the action and the forum in which a dispute concerning subpoena enforcement is litigated.

Br. 18 (citation omitted). An examination of the summary enforcement decisions cited by the Commission (at 18 n.14) reveals that the Commission has sometimes taken over one or two years, from the date of the original charge, to issue a subpoena (*Tempel; South Carolina National Bank*); that the Commission has waited from 4 to 15 months to bring an enforcement action (*Staley; Bay Shipbuilding; University of Pittsburgh*); and that such actions have been resolved in the courts in 3 to 7 months, once enforcement applications were filed (*Staley; University of Pittsburgh; Bay Shipbuilding*).

¹² See Motion to Transfer, *EEOC v. Shell Oil Co.*, No. 81-5020, at 2 (S.D. Ill., filed Feb. 20, 1981). See also 466 U.S. at 59-60.

¹³ See Memorandum in Support of Defendant's Motion to Dismiss, *Shell Oil Co. v. EEOC*, No. 80-1202-C(5) (E.D. Mo., filed Nov. 24, 1980).

Further, the Commission prevailed in *Shell Oil*, and without delay: Enforcement of the subpoena there was ordered four months after transfer of the enforcement action to the court hearing the declaratory action. Since it took the Commission five months just to file its enforcement action in that case, see *Shell Oil Co. v. EEOC*, 523 F. Supp. 79, 82 (E.D. Mo. 1981), it is hard to see any appreciable impairment of its enforcement ability attributable to either the transfer motion or the eventual resolution of the dispute in the context of the action brought by the employer.

Thus, the Commission's argument about impairing its enforcement ability is a smokescreen for its real concern in this case: whether the dispute over disclosure of peer review materials would be considered by the court preferred by the Commission or the one selected by the University. The Commission has presented no persuasive reason why its ability to enforce a subpoena, let alone Title VII, is affected at all by which party initiates the lawsuit, what form it takes, or where the action is heard.

III. ADHERING TO THE FIRST-FILED RULE IN THIS CASE WOULD NOT UNDERCUT COMITY OR WISE JUDICIAL ADMINISTRATION.

A. The University's Action Was Not Preemptive And Did Not Foreclose Conciliation Efforts Since Litigation Could Not Have Been Avoided In Any Event.

The Commission seeks to avoid the usual rules of comity by labelling the University's action "preemptive." We already have explained why that characterization is wrong. See Pet. Br. 31-34. In each of the cases cited by the Commission where the anticipatory nature of a suit was relied upon, among other factors, in support of dismissal (Resp. Br. 22 n.20), the action involved merely the assertion, as claims, of defenses to an imminent suit.¹⁴

¹⁴ While disputing our reading of these cases (see Resp. Br. 22-23 n.20), the Commission does not cite one case that was dismissed solely because it was filed when another suit was expected. Rather, it is the attempt to preempt a more appropriate suit—in terms of

Here, on the contrary, the University's allegations involved the assertion of federal constitutional or statutory rights that had to be resolved regardless of the disposition of the narrower issue presented by the later action. It therefore is a distortion of the record to say, as the Commission does, that the University merely "join[ed] additional claims to a request for an order quashing a Commission subpoena." Resp. Br. 22. Thus, the Commission's argument that preemptive suits should be disfavored because they "promote[] conflicts among courts" (Resp. Br. 23) is not relevant to the University's action.¹⁵

Nor can the Commission seriously claim that by granting priority to the University's action the courts would be "punish[ing] responsible efforts to avoid litigation." Resp. Br. 23. It does not matter whether the focus is on the "courts' general interest in promoting settlements" or on "Title VII's policy of encouraging conciliation of disputes." Resp. Br. 25. In its petition to modify the subpoena, the University made every effort to convince the Commission to adopt a more flexible, bal-

the forum, the parties, the subject matter, or some other material factor—that has led to dismissal of the anticipatory action. Here, the University's broader, first-filed action, in the Commission's home forum, was, if anything, the more appropriate action. Moreover, in several of the cases cited by the Commission, the courts found bad faith or a flagrant abuse of the court's process. *E.g.*, *Consolidated Rail Corp. v. Grand Trunk Western R.R.*, 592 F. Supp. 562 (E.D. Pa. 1984); *State Farm Fire & Cas. Co. v. Taylor*, 118 F.R.D. 426 (M.D.N.C. 1988). No such findings were made or could have been made in this case, and the Commission does not make such allegations.

¹⁵ Moreover, it ill serves the Commission to accuse the University of fostering a conflict between courts, when the Commission could have counterclaimed for enforcement rather than filing a duplicative action. See pp. 4-5 above. As the District of Columbia and Third Circuits agreed in *Wearly v. FTC*, 616 F.2d 662 (3d Cir. 1980), with respect to a similar situation involving duplicative suits concerning a subpoena issued by the Federal Trade Commission, "[t]he deliberate creation of conflict between courts of concurrent jurisdiction is unseemly and should not be undertaken by the Commission." *Id.* at 664 n.1 (emphasis added).

ancing, case-by-case approach to disclosure.¹⁶ The Commission rejected that overture out-of-hand. It instead adhered to its rigid rule of refusing to recognize a balancing approach for peer review materials and thus "reject[ed] such an approach in the instant case" Pet. App. A-33. Thus, there was *no* chance in this case that either the dispute over the *Tung* subpoena or the larger dispute over the Commission's peer review disclosure policy could be resolved without litigation.¹⁷

B. Either Party's Desire To Avoid Or Avail Itself Of Third Circuit Precedent Was Not A Relevant Consideration.

The Commission has not cited any authority that would call into question our submission that a realistic view of litigation in the federal courts accepts as inevitable—and appropriate—that a responsible lawyer will consider

¹⁶ The University "request[ed] that the Commission 'modify its approach in tenure review investigations to adopt a balancing approach reflecting the constitutional and societal interests inherent in the peer review process and that the Commission alter its policy to adopt all feasible [methods] to minimize the intrusive effects of its investigations" Pet. App. A-30.

¹⁷ The Commission also faults the University for filing its suit during the grace period provided for compliance with the *Tung* subpoena. The same situation existed, however, in *EEOC v. Shell Oil Co.*, *supra*, where Shell filed its declaratory judgment action the day before the grace period expired. See Motion to Transfer, *EEOC v. Shell Oil Co.*, *supra*, at 4. Moreover, in this case the grace period was immaterial to the University's general challenge to the Commission's ongoing policy. The University could have filed its suit before the *Tung* subpoena dispute even arose, but chose instead to attempt to convince the Commission, by means of an administrative appeal, to change its policy. Moreover, by waiting until the *Tung* subpoena was issued, there could be no objections on grounds of ripeness or standing, since there was a particular subpoena to serve as a concrete example of the threat to the University's First Amendment interests.

Finally, the Commission did not file its enforcement action until nearly six weeks after the expiration of the grace period. Thus, the Commission was not prejudiced by the timing of the University's filing.

the applicable precedent before filing a lawsuit.¹⁸ Nor has the Commission cited any case that was dismissed or transferred from an otherwise appropriate forum on the ground that the plaintiff did not file in a less favorable forum.¹⁹

The Commission claims that these principles—as well as the Court's ruling in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), that the applicable law in different forums should not play a role in a discretionary decision to dismiss or retain jurisdiction—"cannot fairly be applied to anticipatory suits." Resp. Br. 27. The Commission provides no reasoning or support for this assertion. In fact, the logic of *Piper Aircraft* applies perfectly to this case: The appropriate forum for litigation should be determined on objective considerations of convenience of the parties and witnesses, and the interests of the judicial system, rather than subjective motives or the desire to apply law more favorable to one party than another.²⁰ In any event, as we have shown, the University's action was not "preemptive" or "anticipatory" as those terms have been understood in this context. In each of the cases cited by the Commission (Resp. Br. 28 n.28), no independent claim was asserted by the "anticipatory" plaintiff.

¹⁸ See generally Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 691 & n.94 (1984). "Forum shopping" in this narrow sense is not "inherently bad" or "an evil per se." *Id.* at 691 (quoting Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 710 (1974)).

¹⁹ In *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177, 179 (2d Cir. 1969), the court said that a "special circumstance[]" justifying a departure from the 'first-filed' rule . . . is where forum shopping *alone* motivated the choice of the situs for the first suit" (emphasis added). See also cases cited in Pet. Br. 28 n.24.

²⁰ Cf. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2244 (1988) (district court appropriately might "refuse to transfer a case notwithstanding the counterweight of a [contractual] forum-selection clause," because of the "public-interest factors of systemic integrity and fairness").

**C. Proceeding With The Enforcement Action Created
A Substantial Risk Of Inconsistent Judgments And
Conflicting Results.**

A substantial risk of inconsistent judgments and conflicting results was created here with regard to both the First Amendment and APA issues still pending in the District of Columbia action. In fact, the Commission itself took the position in the District of Columbia court that the maintenance of both actions would lead "to two decisions on the same issue and possibly inconsistent results."²¹

1. *First Amendment.* Devoting all its attention to the University's APA claims, the Commission does not even address the University's claim that the subpoena and the rule on which it was based violate the First Amendment. The District of Columbia court has stated that it views the University's facial First Amendment claim as "a substantial claim deserving of a full hearing." Tr. of Oral Arg., *University of Pennsylvania v. EEOC*, No. 87-1199, at 9 (D.D.C., Oct. 11, 1988). If that court eventually were to rule in favor of the University, it could order the Commission to refrain from taking any action pursuant to its unconstitutional peer review disclosure rule, including attempting to obtain subpoenaed documents. This would create a conflict with the judgment of the District Court below, which ordered enforcement of the *Tung* subpoena. Moreover, even if the parties might not be subject to precisely conflicting judgments in the sense of being unable to comply with one without violating the other, the judgment of one court

²¹ Tr. of Oral Arg., *EEOC v. University of Pennsylvania*, No. 87-1199, at 8 (D.D.C., Oct. 11, 1988). See also *id.* at 3. At oral argument before the Court of Appeals, a member of the panel also asked about the "unseemly spectacle" in this case "of two Courts proceeding with actions with the probability of inconsistent results on a matter of terribly important public policy[.]" Tr. of Oral Arg., No. 87-1547, at 35 (3d Cir., Feb. 25, 1988).

clearly would interfere with the authority of the other to decide a case before it.²²

2. *Administrative Procedure Act.* The Third Circuit held that the University's claims of unlawful rulemaking under the APA could have no effect on the enforceability of the *Tung* subpoena, stating that the "[i]nvalidation of an alleged EEOC subpoena 'rule' in an enforcement proceeding would not overrule the EEOC's statutory grant of investigative subpoena power in individual cases." 850 F.2d at 981 (Pet. App. A-25). It therefore affirmed the District Court's refusal to consider the University's APA arguments in connection with the *Tung* subpoena. Taking the same position, the Commission asserts that the University's action in the District of Columbia was broader than the enforcement action "only because it included claims—aimed at an allegedly unlawful Commission 'rule'—that were no defense to the subpoena." Resp. Br. 30. Accordingly, the Commission claims that there was no need to resolve all the claims in one action, and that "there could be no meaningful inconsistency between a timely order enforcing the subpoena and any ruling that the District of Columbia [court] might later issue with respect to any such 'rule.'" *Id.*

The *Tung* subpoena, however, cannot be considered independently of the Commission's general rule. It does not matter that the Commission has general statutory authority to issue subpoenas seeking relevant information. The determination by the Commission to issue the *Tung* subpoena and its subsequent refusal to modify it (to take into account the competing considerations pressed by the University) was not based on a fresh, *de novo* con-

²² The University continues to press its argument that the Court of Appeals should not even have reached the First Amendment issue, since it should have reversed the District Court for failing to exercise its discretion by considering the relevant factors on the University's motion to dismiss. See *United States v. Taylor*, 108 S. Ct. 2413, 2420, 2423 (1988); Pet. Br. 21-22 nn. 16 & 17.

sideration of the University's position. Rather, it was based on the Commission's prior determination, reached without any notice or comment as required by the APA, that in all tenure review cases, no balancing would take place and no consideration would be given to academic freedom concerns.²³

Both this Court and the Court of Appeals for the District of Columbia have ruled that if an agency adopts a rule unlawfully, actions taken pursuant to that rule cannot be sustained, even if the agency was not required to act pursuant to a rule and could have taken the same action in the absence of the unlawful rule. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982).²⁴ It necessarily follows that the Third Cir-

²³ The University obviously is not asking the Court to decide the merits of the underlying APA issue. But in considering the University's claim that there is a substantial risk of inconsistent judgments, it must be assumed that the University may prove its allegations and prevail on its APA claim. In the absence of such assumptions, there could not be even the possibility of inconsistent judgments.

²⁴ In *Wyman-Gordon*, five Justices agreed that if an agency rule is invalid (because not promulgated pursuant to notice-and-comment procedures or as a binding order in an adjudicatory proceeding), then a subpoena issued in conformity with that rule is invalid and unenforceable. Three of those Justices were of the opinion, however, that because the rule under consideration in *Wyman-Gordon* had been issued in an adjudicatory proceeding, it was not unlawful.

In *Independent Tankers*, the D.C. Circuit addressed itself to "the effect of an invalidly promulgated rule upon an adjudicative decision that relies on that rule when the decision, without any rule, would have been within the discretion of the agency[.]" 690 F.2d at 920. There the agency took the position that "any invalidity of the . . . rule merely wipes the slate clean, as if [the agency] had never even attempted to promulgate a rule." *Id.* Relying on *Wyman-Gordon*, the D.C. Circuit rejected the agency's position. The court stated:

"One purpose of the APA's rulemaking provisions is to ensure that all of the competing considerations are canvassed before a decision is reached. If the NLRB could violate those provisions in adopting a rule and then issue an order based on the

cuit was wrong in affirming enforcement of the subpoena without considering the University's APA arguments. It also follows that there would be an unavoidable inconsistency in results—and a conflict between judgments—if the District of Columbia court resolved this issue in the University's favor.

3. *Need for comprehensive resolution.* For these reasons, the question of the enforceability of the *Tung* subpoena should have been resolved together with, and in the context of, the University's broader challenge. It is not a matter of holding the *Tung* subpoena "hostage" during the resolution of the larger questions (see Resp. Br. 36); it is a matter of not rushing to enforce an allegedly unlawful subpoena before determining the merits of the University's claims.

rule, without recanvassing the competing considerations, this purpose would be thwarted." 690 F.2d at 921.

See also *id.* ("[i]f . . . the NLRB may properly enforce an invalid rule in subsequent adjudications, the rulemaking provisions of the Administrative Procedure Act are completely trivialized") (quoting 394 U.S. at 781 (Harlan, J., dissenting)).

As in *Wyman-Gordon*, the EEOC's rejection of the University's request to modify the subpoena "followed automatically" from its general policy refusing to balance a university's interests against the Commission's desire to obtain information. Thus, under *Wyman-Gordon* and *Independent Tankers*, the *Tung* subpoena could not be enforced if the University could establish that the Commission had a rule concerning peer review disclosures, that that rule had been adopted in violation of the APA, and that the agency's actions with regard to the *Tung* subpoena "followed automatically" from the invalid rule.

CONCLUSION

For the foregoing reasons and those stated in the University's opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel:

SHELLEY Z. GREEN
NEIL J. HAMBURG
General Counsel
UNIVERSITY OF
PENNSYLVANIA
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

STEVEN B. FEIRSON
(Counsel of Record)
ALAN D. BERKOWITZ
NANCY J. BREGSTEIN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000

Counsel for Petitioner

March 29, 1989

PETITIONER'S BRIEF

18
No. 88-493

Supreme Court, U.S.
FILED
JUN 23 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF PETITIONER

SHELLEY Z. GREEN
NEIL J. HAMBURG
Office of the General Counsel
University of Pennsylvania
110 College Hall
Philadelphia PA 19104
(215) 898-7660

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
LOREEN M. MARCIL
JULI E. FARRIS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner

June 23, 1989

* Counsel of Record

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission ("EEOC"), during an investigation into a claim of employment discrimination against a university by a professor denied tenure, may compel the production of confidential peer review documents compiled in the course of tenure decisions concerning both the complainant and others without any specific showing that the documents will likely advance the investigation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS AND FEDERAL RULES INVOLVED.....	2
STATEMENT	2
SUMMARY OF ARGUMENT	10
ARGUMENT	14
I. DISCLOSURE OF CONFIDENTIAL PEER REVIEW MATERIALS, WITHOUT ANY SPECIFIC SHOWING, WOULD INFRINGE BOTH THE UNIVERSITY'S RIGHT TO ACA- DEMIC FREEDOM UNDER THE FIRST AMENDMENT AND THE UNIVERSITY'S COMMON LAW QUALIFIED PRIVILEGE.....	15
A. Confidential Peer Review Materials Are En- titled To Protection Under The First Amend- ment	15
B. Confidential Peer Review Materials Are En- titled To Protection Under A Federal Com- mon Law Qualified Privilege	21
C. Requiring Disclosure Upon Demand Of Con- fidential Peer Review Documents Results In An Infringement Of The University's First Amendment Rights And Improperly Disre- gards The University's Qualified Academic Privilege	32

TABLE OF CONTENTS—Continued

	Page
II. THIS COURT SHOULD CONSTRUE THE SUBPOENA ENFORCEMENT PROVISION OF TITLE VII NARROWLY TO AVOID CREATING A SUBSTANTIAL CONSTITUTIONAL QUESTION	37
A. This Court Should Narrowly Construe The Subpoena Enforcement Provisions Of Title VII To Provide A Qualified Privilege For Confidential Peer Review Materials	38
B. This Court Should Not Construe The Enforcement Provisions Of Title VII To Intrude Upon First Amendment Rights Absent A Clear Statement From Congress	41
III. A RULE REQUIRING DISCLOSURE UPON DEMAND OF CONFIDENTIAL PEER REVIEW MATERIALS IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST AND IS ACCORDINGLY UNCONSTITUTIONAL	44
CONCLUSION	49

TABLE OF AUTHORITIES

CASES	Page
<i>Adler v. Board of Education</i> , 342 U.S. 485 (1952) ..	15
<i>ACLU of Mississippi, Inc. v. Finch</i> , 638 F.2d 1336 (5th Cir. 1981)	24
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936)	38
<i>Barenblatt v. United States</i> , 360 U.S. 109 (1959) ..	14, 45
<i>Board of Curators v. Horowitz</i> , 435 U.S. 78 (1978)	37
<i>Board of Directors of Rotary International v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987)	17
<i>Board of Trustees of Stanford University v. Superior Court</i> , 119 Cal. App. 3d 516 (1981)	29
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	14, 16, 31, 45
<i>Brown v. Socialist Workers '74 Campaign Committee</i> , 459 U.S. 87 (1982)	33
<i>Civil Aeronautics Board v. Air Transport Association of America</i> , 201 F. Supp. 318 (D.D.C. 1961)	40
<i>Clark v. United States</i> , 289 U.S. 1 (1933)	23, 28
<i>Cockrell v. Middlebury College</i> , 536 A.2d 547 (Vt. 1987)	29
<i>Corporation of the Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987)	17
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	38
<i>Doe v. Iowa State Board of Physical Therapy & Occupational Therapy Examiners</i> , 320 N.W.2d 557 (Iowa 1982)	30
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 211 (1979)	23, 35
<i>Drukker Communications, Inc. v. NLRB</i> , 700 F.2d 727 (D.C. Cir. 1983)	40
<i>EEOC v. Associated Dry Goods Corp.</i> , 449 U.S. 590 (1981)	33, 34
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	passim
<i>EEOC v. Packard Electric Division, General Motors Corp.</i> , 569 F.2d 315 (5th Cir. 1978)	40
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	36, 39

TABLE OF AUTHORITIES—Continued

	Page
<i>EEOC v. University of Notre Dame Du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	<i>passim</i>
<i>Escambia County, Florida v. McMillan</i> , 466 U.S. 48 (1984)	12, 38
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	45, 49
<i>Fisher v. United States</i> , 425 U.S. 391 (1976)	27, 28
<i>FTC v. Shaffner</i> , 626 F.2d 32 (7th Cir. 1980)	40
<i>Funk v. United States</i> , 290 U.S. 371 (1933)	29
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	23, 46, 47, 48
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	16
<i>Hafermehl v. University of Washington</i> , 628 P.2d 846 (Wash. Ct. App. 1981)	29
<i>In re Hampers</i> , 651 F.2d 19 (1st Cir. 1981)	24
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	13, 44
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	31
<i>International Association of Machinists v. Street</i> , 367 U.S. 740 (1961)	42
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	17
<i>Kappas v. Chestnut Lodge</i> , 709 F.2d 878 (4th Cir.), <i>cert. denied</i> , 464 U.S. 852 (1983)	30
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir.), <i>cert. denied</i> , 434 U.S. 904 (1977)	46
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	15, 16, 24
<i>King v. Bartholomew County Hospital</i> , 476 N.E.2d 877 (Ind. Ct. App. 1985)	30
<i>Kunda v. Muhlenberg College</i> , 621 F.2d 532 (3d Cir. 1980)	35
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829 (1978)	13, 45
<i>Lowe v. SEC</i> , 472 U.S. 181 (1985)	42
<i>McKillop v. Regents of the University of California</i> , 386 F. Supp. 1270 (N.D. Cal. 1975)	30
<i>Mobile v. Bolden</i> , 446 U.S. 55 (1980)	44
<i>Mount Healthy City Board of Education v. Doyle</i> , 429 U.S. 274 (1977)	44

TABLE OF AUTHORITIES—Continued

	Page
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	16, 32
<i>NLRB v. British Auto Parts, Inc.</i> , 266 F. Supp. 368 (C.D. Cal. 1967)	23
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	12, 38, 42
<i>NLRB v. Harvey</i> , 349 F.2d 900 (4th Cir. 1965)	23, 40
<i>NLRB v. North American Van Lines, Inc.</i> , 611 F. Supp. 760 (N.D. Ind. 1985)	23
<i>NLRB v. Quest-Shon Mark Brassiere Co.</i> , 185 F.2d 285 (2d Cir. 1950), <i>cert. denied</i> , 342 U.S. 812 (1951)	40
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975)	23, 27, 28
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	37
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	19
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	16
<i>Pittsburgh Plate Glass Co. v. United States</i> , 360 U.S. 395 (1959)	28, 46
<i>Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church</i> , 393 U.S. 440 (1969)	17
<i>Public Citizen v. Department of Justice</i> , No. 88-429, slip op. (June 21, 1989)	33, 42
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	9, 10, 16, 17
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	17
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	17, 18
<i>Roviano v. United States</i> , 353 U.S. 53 (1957)	30
<i>SEC v. First Security Bank of Utah</i> , 447 F.2d 166 (10th Cir. 1971)	40
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	16, 45, 49
<i>State v. Haverty</i> , 267 S.E.2d 727 (W. Va. 1980)	30
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	9, 10, 16, 17, 39
<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	10, 22, 24, 29

TABLE OF AUTHORITIES—Continued

Page

<i>Ex parte United States</i> , 101 F.2d 870 (7th Cir. 1939)	29
<i>United States v. Gillock</i> , 445 U.S. 360 (1980)	29
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	passim
<i>United States v. Powell</i> , 379 U.S. 48 (1964)	40
<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981) ..	40
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	16
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	17
<i>Wolfe v. United States</i> , 291 U.S. 7 (1934)	29
<i>Zaustinsky v. University of California</i> , 96 F.R.D. 622 (N.D. Cal. 1983), <i>aff'd without op.</i> , 782 F.2d 1055 (9th Cir. 1985)	23, 24

CONSTITUTIONAL PROVISIONS
AND STATUTES

U.S. Const. amend. I	passim
28 U.S.C. § 1254(1)	1
29 U.S.C. § 161	passim
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e	passim
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972)	26
29 C.F.R. § 1601.22	33

LEGISLATIVE MATERIALS

118 Cong. Rec. 1993 (1972)	43
120 Cong. Rec. 2391 (1974)	22
120 Cong. Rec. 40,891 (1974)	22
S. Rep. No. 415, 92d Cong., 2d Sess. (1971)	43
H.R. Rep. No. 238, 92d Cong., 2d Sess., <i>reprinted in 1972 U.S. Code Cong. & Ad. News</i> , 2137	43, 44

OTHER AUTHORITIES

American Association of University Professors, <i>Statement of Principles on Academic Freedom and Tenure</i> (1940), <i>reprinted in AAUP Policy Documents & Reports</i> (1984)	19
American Council of Education, <i>Guidelines for Colleges and Universities</i> , No. 7 (Dec. 1981)	21, 25

TABLE OF AUTHORITIES—Continued

Page

American Medical Association, <i>A Compendium of State Peer Review Laws</i> (1988)	30
Byrne, <i>Academic Freedom: A "Special Concern of the First Amendment,"</i> Yale L.J. (forthcoming)	16, 21, 37
Chronicle of Higher Education, Sept. 29, 1980	36
Hill & Hill, <i>Employment Discrimination: A Roll-back of Confidentiality in University Tenure Procedures?</i> , 22 Am. Bus. L.J. 209 (1984)	21, 35
Krattenmaker, <i>Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach</i> , 64 Geo. L.J. 613 (1976)	22
Kroll, <i>Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom</i> , 13 Urban L. Ann. 107 (1977)	17
Lovejoy, <i>Academic Freedom</i> , <i>reprinted in The American Concept of Academic Freedom in Formation</i> (W. Metzger ed. 1977)	19
Murphy, <i>Academic Freedom—An Emerging Constitutional Right</i> , 28 Law & Contemp. Probs. 447 (1963)	25
Note, <i>Academic Freedom and Federal Regulation of University Hiring</i> , 92 Harv. L. Rev. 879 (1979)	18
Note, <i>Developments in the Law: Academic Freedom</i> , 81 Harv. Rev. 1045 (1968)	25
Note, <i>The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation</i> , 65 Wash. U.L.Q. 445 (1987)	18, 48
Note, <i>Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege</i> , 69 Calif. L. Rev. 1538 (1981)	25, 34
J. Rapp, <i>Education Law</i> § 6.07[4] (1986)	20
Report of the Committee on Confidentiality in the Matters of Faculty Appointment, U. Chi. Rec. 165 (May 22, 1979)	20, 25, 34
Smith, <i>Protecting the Confidentiality of Faculty Peer Review Records</i> , 8 J. Coll. & Univ. L. 20 (1981)	25

TABLE OF AUTHORITIES—Continued

	Page
8 J. Wigmore, Evidence § 2285 (McNaughton ed. 1981)	24
C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5421	22, 29
STATUTES AND RULES OF EVIDENCE	
Fed. R. Evid. 501	2, 21, 22, 23, 44
Fed. R. Evid. 1101	22
Proposed Fed. R. Evid., 56 F.R.D. 183	22
Ala. Civ. Code § 6-5-333	30
Alaska Code Civ. Proc. § 9.25.150	29
Ark. Code Pub. Health and Welfare §§ 20-9-501 through 503	30
Cal. Evid. Code § 1040	29
Colo. Code Ct. Proc. § 13-90-107(e)	29
Idaho R. Evid. § 9-203(5)	29
Ind. Code Civ. Proc. § 34-4-12.6-1 through 6-3	30
Iowa Educ. Code §§ 258A.1, 258A.6	
Kan. Code Ct. Proc. § 60-434	29
Md. Code Health Occupations § 14-601	30
Minn. Civ. Code § 595.02(e)	29
Pa. Code Professions and Occupations § 425.1 through 425.4	31
Wash. Rev. Code § 5.60.060(5)	29
Wash. Rev. Code § 28B.10.648	29
Wis. Pub. Health Stat. § 146.38	31

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

 No. 88-493

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v.

 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

 On Writ of Certiorari to the
 United States Court of Appeals
 for the Third Circuit

BRIEF OF PETITIONER

 OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 850 F.2d 969. The opinions of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 34-35) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1988 and a petition for rehearing was denied on August 11, 1988. Pet. App. 1, 28. The petition for a writ of certiorari was filed on September 19, 1988, and the petition was granted on December 12, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble

U.S. Const. amend I.

Title VII of the Civil Rights Act of 1964 provides, in relevant part:

In connection with any investigation of a charge filed under Section 2000e-5 of this title, the Commission . . . shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

42 U.S.C. § 2000e-8(a).

Rule 501 of the Federal Rules of Evidence provides, in relevant part:

Except as otherwise . . . provided by Act of Congress . . . the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. R. Evid. 501.

STATEMENT

Petitioner University of Pennsylvania is a private University located in Philadelphia, Pennsylvania. It was founded by Benjamin Franklin in 1740 and became, in 1791, the first university in the United States. Today the University has approximately 18,000 full-time students enrolled in its 12 schools.

This case arises out of an action brought by the EEOC against the University to enforce a subpoena for production—of documents issued in connection with the EEOC's investigation of a faculty member's charge that the decision denying her tenure was based on gender and national origin. Although the University has voluntarily produced a substantial number of documents requested by the EEOC, the University consistently has objected to disclosure of a narrow class of confidential materials involving peer reviews of the complainant and other members of the faculty in an effort to protect the integrity of the tenure evaluation process. The EEOC has just as consistently insisted that the documents in question enjoy no privilege and that the EEOC is accordingly entitled to wholesale production of *all* documents within the University's files on a *de minimis* showing of relevance and without first having reviewed any of the materials already produced by the University. In sum, the issue in this case is whether the concededly confidential materials at issue are entitled to any meaningful protection under either the Constitution or the common law from disclosure to the EEOC.

1. The EEOC initiated an investigation based on a charge filed against the University by Rosalie Tung, an associate professor in the Management Department of the University's Wharton School of Business. Tung had been hired by the Wharton School in 1981 and was considered for tenure during the 1984-1985 academic year. Like the majority of candidates for tenure at the University, Tung was denied tenure. Although the members of Tung's own department, by a closely divided vote, recommended her favorably, the Wharton School's Advisory Committee on Faculty Personnel—after an independent and in-depth evaluation of Tung's qualifications and scholarship—decided not to recommend her for tenure.¹

¹ It is not at all uncommon for the Wharton School's Personnel Committee to reverse a favorable vote on tenure by the members of

The Personnel Committee's decision was based on several considerations; in particular, the Chairman of the Committee identified "serious concerns about the lack of scholarly depth in the candidate's writings."² Tung requested a reevaluation, which was granted. Nevertheless, following her submission of additional material and reconsideration by the entire Committee, the Committee voted a second time on April 16, 1985 not to recommend Tung for tenure.

Shortly thereafter, Tung filed a charge with the EEOC, alleging that she was denied tenure on account of her gender and national origin (Chinese). J.A. 23-24. The University voluntarily cooperated with the EEOC's investigation, supplying "a wide range of documents." Pet. App. 4. In response to the EEOC's expansive request for information, the University provided, *inter alia*:

- the Personnel Committee's statement of reasons for the denial of tenure;
- two detailed position statements describing the University's tenure review process and its treatment of Tung's candidacy for tenure;
- Tung's complete personnel file;
- a chart showing the results of tenure decisions for candidates at the Wharton School which included the sex, race, national origin, rank and department of each candidate;

the candidate's own department. Within two years of the vote on Tung's tenure, the Personnel Committee had determined not to recommend two male candidates for tenure after they had been recommended by Wharton's Management Department.

² Letter from Dr. Morris Hamburg, Chairman of the Personnel Committee to Dean Russell Palmer (Sept. 26, 1985). The Committee believed that "there was an absence of development of theoretical or strong conceptual frameworks and that the analysis and methodological procedures were weak." *Id.* Tung was provided with this statement of reasons for the denial of tenure.

- a chart showing appointments to the rank of full professor at the Wharton School by sex, race, national origin, rank and department;
- a summary of applications and appointments to Management Department positions by race, sex and national origin;
- relevant sections from the University's faculty handbook covering faculty structure, tenure review process and the grievance process;
- a description of the University's policies on faculty salary merit increases;
- charts showing salaries and salary increases for associate professors at Wharton, by national origin; and
- information on vacancies, advertisements and recruitment for positions at Wharton.

The University also provided the EEOC with most of Tung's tenure review file, including her teaching evaluations. The only materials not voluntarily provided to the EEOC were a small number of confidential "peer review" documents which fall into two classes. The first class of documents consists of peer review evaluations and letters written by academicians both inside and outside the University commenting on Tung's scholarship and her suitability for tenure. In addition to the written evaluations prepared by Tung's peers (both at Wharton and at other universities), this class of materials includes documents that reflect the individual statements and opinions expressed in the course of the deliberations of the Management Department and Personnel Committee. The second class of documents consists of similar evaluations and materials contained in the files of five male faculty members.³

³ The court below stated that the five male faculty members were "considered with Tung for tenure." Pet. App. 5. In fact, four of

2. After receiving all of the information supplied by the University, the EEOC made no attempt to analyze whether it had sufficient information from which to determine if there was "reasonable cause," or for that matter, any evidence to support Tung's claim of discrimination. Instead of making any preliminary analysis before delving into concededly confidential materials, the EEOC insisted on wholesale access to all peer review documents. On September 18, 1986, the EEOC issued a subpoena *duces tecum* for Tung's complete tenure review file (including both the inside and outside confidential evaluations) and copies of the complete tenure files of the five proposed tenure candidates.

The University petitioned the EEOC to modify its subpoena to exclude the letters regarding Tung written by outside evaluators and the documents reflecting internal peer review evaluations in Tung's tenure file. C.A. App. 4-9. In addition, the University petitioned to withhold the same materials that had been subpoenaed from the files of the five other tenure candidates.⁴ The University argued that protecting the strict confidentiality of such peer review materials was necessary to "preserve the integrity of its peer review process." C.A. App. 5.

The University's petition for modification was denied by the EEOC on March 27, 1987. In doing so, the EEOC flatly denied any obligation to consider the confidentiality of the documents in question or to balance its need for the documents against the effect of their disclosure, holding that to do so might "impair the Commission's ability

these persons were candidates for tenure in departments other than Tung's department and one of those was considered in a different academic year. C.A. App. 8.

⁴ The subpoena also called for the names of the persons on the management department's tenure committee and the Personnel Committee. That information was voluntarily provided by the University. C.A. App. 8.

to fully investigate this charge of discrimination." C.A. App. 14.

2. On June 19, 1987, the EEOC filed an action in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of its subpoena.⁵ The University moved to dismiss the enforcement action or, in the alternative, to obtain discovery concerning its objections to the subpoena. On September 1, 1987, the district court denied the University's request for discovery, holding that the University's First Amendment defense was "an improper response to an application to enforce an administrative subpoena." Pet. App. 34.⁶ Accordingly, the district court ordered the University to comply with the subpoena *duces tecum* within ten days.

3. The Third Circuit affirmed, relying entirely on its previous decision in *EEOC v. Franklin & Marshall Col-*

⁵ To protect its rights not only in this case but in the future, the University, on May 1, 1987, filed suit in the United States District Court for the District of Columbia, seeking a declaratory judgment with respect to the validity—under the First Amendment and the Administrative Procedure Act—of the EEOC's general policy with respect to subpoenas of confidential tenure-related documents. The complaint filed by the University also sought, in Count IV, to enjoin enforcement of the subpoena in the Tung investigation. That action is still pending in the district court.

⁶ Because the district court determined that the First Amendment issue was not a "proper" response to a petition to enforce the subpoena, the University was precluded from presenting any affidavits or other evidence relating to that defense. However, in the declaratory judgment action in the District of Columbia, *supra* note 5, the University had submitted affidavits from university professors and administrators from around the country which unanimously attested to the critical importance of confidentiality to the peer review process of tenure evaluations. See Attachments to Memorandum in Support of Plaintiff's Motion for Summary Judgment, *Trustees of the University of Pennsylvania v. EEOC*, No. 87-1199 (D.D.C. June 30, 1988). Copies of these affidavits, which are on the public record in the related District of Columbia case, have been lodged with the Clerk of this Court for the Court's convenience and served upon the Solicitor General.

lege, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986). In *Franklin & Marshall*, a divided panel of the Third Circuit had "expressly declined to limit the EEOC's subpoena authority to accommodate an academic institution's constitutional right to academic freedom." Pet. App. 11. The court below simply reaffirmed this holding, despite acknowledging that the ruling "would burden the tenure review process and would impact on academic freedom" Pet. App. 10.⁷

In *Franklin & Marshall*, Montbertrand, an assistant professor in the French Department at Franklin and Marshall College, had been denied tenure based on the recommendation of the College's Professional Standards Committee.⁸ Montbertrand filed a charge with the EEOC, alleging that the College had violated Title VII by refusing to grant him tenure because of his French national origin. In connection with its investigation of Montbertrand's charge, the EEOC issued a blanket subpoena for all tenure review documents from all candidates from November, 1977 to the time of the investigation. The College complied with the subpoena in virtually all respects, but it declined to produce the confidential peer review documents used by the Committee to assess the qualifications of the tenure candidates.

As in this case, the EEOC refused to accord any weight to the College's need for confidentiality in the peer review process and it moved for a judicial order enforcing the subpoena. There was no effort to make any showing of need for the documents in dispute, but the district

⁷ The court below did not undertake to reexamine the holding in *Franklin & Marshall*, noting simply that it "lack[ed] authority to overrule an opinion of a previous panel." Pet. App. 22.

⁸ Montbertrand was informed that the Committee had determined not to recommend tenure because "deficiencies in the areas of scholarship and general contributions were not sufficiently offset by performance in other areas." Pet. App. 40.

court, in a one-sentence order, compelled the College to comply with the subpoena.⁹

On appeal, a divided panel of the Third Circuit affirmed. The majority conceded that academic freedom—including the freedom to determine "who may teach"—has "long [] been viewed as a special concern of the First Amendment." Pet. App. 44-45 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (plurality opinion) and *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).¹⁰ Nevertheless, the court held that "the EEOC is entitled to all that is relevant to the charge under investigation." Pet. App. 48.

Then-Chief Judge Aldisert dissented. Pet. App. 51. He reviewed this Court's cases discussing the special status of academic freedom under the First Amendment and he examined the central role of the tenure process in protecting that freedom. The dissent concluded that Congress in enacting Title VII did not intend "a massive and uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process" Rather, Congress' intent in Title VII would be fully served by allowing federal courts to balance the EEOC's interest in necessary discovery against the College's First Amendment-protected interest in protecting the confidentiality of the peer review materials used in the tenure process.

⁹ The court did indicate that the College could "omit the names and identifying data of other professors" in the materials to be produced to the Commission. This was not objected to by the EEOC.

¹⁰ The majority also "recognize[d]" that "confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review, and, thus, has been essential to the determination of 'who may teach'" Pet. App. 45.

Under this standard, Chief Judge Aldisert argued that the EEOC should be required to review the information that had previously been disclosed and show that there is some factual predicate for the claim of discrimination. Only in that event should the court enforce the EEOC's subpoena for the confidential materials contained in the third party tenure review files.

SUMMARY OF ARGUMENT

I.

Academic freedom, protected by the First Amendment, provides the university with "freedom . . . to make its own judgments as to education" including the right to determine, through its own institutional processes, which faculty members will receive tenure. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). The peer review process is central to a rational tenure system. Peer review ensures that those members of the faculty who will have a lifetime appointment to shape and be shaped by the university are of a quality and dedication that merits the extraordinary protection tenure affords. In order for the peer review process to function, the university must be able to provide meaningful guarantees of confidentiality and thereby to obtain candid and detailed comments about the tenure candidate. Thus, confidentiality in the peer review system is critical to the ability of the university to exercise a core element of First Amendment-protected academic freedom—the right to determine, pursuant to proper academic standards, "who may teach." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

Under the federal law of privilege, a qualified privilege should be recognized where the privilege supports "sufficiently important interests to outweigh the need for probative evidence." *Trammel v. United States*, 445 U.S.

40, 51 (1980). In this case, a qualified privilege would maintain the degree of confidentiality in peer review necessary to promote the most qualified teachers and scholars, thereby ensuring that American universities continue to play a central and innovative role in the marketplace of ideas. On the other side of the balance, the qualified privilege would require that the EEOC merely review the non-privileged documents and make an individualized determination, based on the available information from those sources, before insisting on wholesale violations of the university's pledge of confidentiality. Recognition of a qualified privilege for academic peer review documents would protect society's interest in maintaining the vitality and quality of university scholarship and teaching while imposing—at most—a negligible burden on the EEOC.

The rule adopted by the court below—which requires disclosure upon demand of peer review documents—violates the University's First Amendment right to academic freedom and disregards the qualified privilege. Such routine disclosures of the University's (and faculty's) most confidential materials clearly will have a chilling effect on the candor of academic peer review and even on the willingness of many scholars to participate. As the quality of peer review evaluations declines, the system will lose its reliability and the quality of tenure decision-making will suffer. The absence of some degree of confidentiality in the peer review system will increase divisiveness and destroy collegiality, ultimately working to the detriment of tenure candidates as well as universities. Because the peer-reviewed tenure process is a central component of the academic freedom protected by the First Amendment, the application of a rule which mandates automatic disclosures of peer review material, and thereby destroys that process, constitutes a significant infringement of a constitutional right.

II.

This Court should construe the EEOC's subpoena enforcement power to recognize the qualified privilege and thereby avoid the substantial First Amendment question created by the Third Circuit's "automatic disclosure" rule. The court below, in reaching the contrary conclusion and adopting a rule mandating disclosure upon demand of confidential peer review documents, ratified a reading of Title VII's subpoena enforcement section which violated two bedrock rules of statutory construction. First, this Court repeatedly has stated that, whenever reasonably possible, a statute should be construed to avoid creation of a constitutional question. *Escambia County, Florida v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). The court below erred in ignoring the reasonable construction of the EEOC subpoena enforcement provision that would permit a qualified privilege to be interposed in an EEOC subpoena enforcement proceeding.

Second, the court below erred in presuming that Congress intended to grant the EEOC the authority to intrude on universities' First Amendment rights and in requiring the University to find evidence of any specific congressional intent to deny the EEOC such authority. By contrast, this Court repeatedly has insisted that a correct statutory interpretation must begin with the opposite presumption: absent a clear statement of congressional intent to the contrary, it should be assumed that Congress did not intend to intrude into a constitutionally protected area. *NLRB v. Catholic Bishop*, 440 U.S. 490, 505-06 (1979). Thus, absent any statement—let alone a clear statement—of congressional intent concerning Title VII and the tenure process, the court below erred in concluding that Congress authorized the EEOC to engage in a wholesale invasion of academic freedom.

III.

If the EEOC's statutory subpoena enforcement authority is construed in a manner which does not permit recognition of any privilege or other exception based on academic freedom interests, then the statute is unconstitutional. Any governmental action which infringes a fundamental constitutional right, such as First Amendment-protected academic freedom, is presumptively unconstitutional. *Harris v. McRae*, 448 U.S. 297, 312 (1980). Thus, for the EEOC's construction of the statute to be upheld, the EEOC would have to demonstrate that its interpretation of the scope of its subpoena authority is narrowly tailored to further a compelling state interest. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978).

Although the University concedes that the EEOC has a compelling interest in the elimination of all invidious discrimination, there is absolutely no support for the position that the EEOC requires unbridled access to confidential peer review documents. To the contrary, if a qualified privilege (or other balancing standard) were applied, the EEOC would still be able to obtain access to such files when it had a legitimate basis for examining the files in order to further its compelling interest. Simply requiring the EEOC to review the material already in its possession and make a showing that the peer review documents would substantially promote its fact-finding process would not be novel or unduly burdensome to EEOC enforcement.

To the contrary, many lower federal courts have for years recognized such a qualified privilege and there is no indication that application of the privilege has handicapped EEOC enforcement in those jurisdictions. At bottom, the EEOC is advocating a rule with the broadest—not the most narrowly tailored—impact on First Amendment rights. Such an interpretation of the statute plainly is unconstitutional.

ARGUMENT

The University's argument is straightforward: this Court should hold that documents which incorporate or reflect peer review evaluations undertaken for purposes of a tenure determination by an academic institution are entitled to *some* protection—constitutional or otherwise—from casual disclosure ordered by the federal government. The EEOC has never asserted that it has any need whatsoever for the documents in question; to the contrary, its consistent position is that it is absolutely entitled to insist upon full disclosure, regardless of the injury to the academic community caused by disclosure or the importance of any competing interests which counsel against disclosure. The only prerequisite to EEOC access, in its view, is a minimal showing of relevance to its investigation.

The University submits that the appropriate outcome in this case can be determined only through a careful and focused balancing of the interests at stake on a case-by-case basis. See *Barenblatt v. United States*, 360 U.S. 109, 126 (1959); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring). In this respect, this case is no different from others involving a conflict between two important societal values. A proper balance here would protect the confidential information in question from court-ordered disclosure unless the government could make a particularized showing of why it believes that those files likely will contain evidence of discrimination or why the files are otherwise needed.

The decision below, which holds that access to highly confidential peer review materials may be obtained upon demand, represents an extreme and ultimately indefensible position. Although there will be circumstances in which a university's interest in protecting peer review materials must yield to the EEOC's or to an individual litigant's legitimate need for evidence, the decision to accord no weight at all to petitioner's right of academic freedom is patently incorrect and must be reversed.

I. DISCLOSURE OF CONFIDENTIAL PEER REVIEW MATERIALS, WITHOUT ANY SPECIFIC SHOWING, WOULD INFRINGE BOTH THE UNIVERSITY'S RIGHT TO ACADEMIC FREEDOM UNDER THE FIRST AMENDMENT AND THE UNIVERSITY'S COMMON LAW QUALIFIED PRIVILEGE

The peer review documents at issue in this case are among the most sensitive and confidential documents contained in a university's files. See *infra* 18-21, 24-25. Because peer review is an essential component of the tenure process, and thus central to the academic mission of the university, unnecessary disclosure of peer review documents—with the resultant pernicious effect on the tenure process—violates the University's right to academic freedom. See *infra* 32-37. In addition, this unwarranted and unnecessary disclosure violates the University's common law qualified privilege to withhold production of such confidential peer review documents. See *infra* 21-32.

A. Confidential Peer Review Materials Are Entitled To Protection Under The First Amendment

1. It is difficult to identify any institution in the United States that by its nature is more deserving of protection under the First Amendment's guarantees of freedom of speech and association than a university or college. The university at its essence is a community of scholars engaged in research, writing and education—the search for knowledge and its dissemination. These activities are central to “the pursuit of truth which the First Amendment was designed to protect.” *Adler v. Board of Education*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting). See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas’”).

This Court already has acknowledged the special role that universities play in our society and has recognized that this nation “is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian*,

385 U.S. at 603. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."). Because of the university's central role in the marketplace of ideas, the First Amendment's protection of academic freedom extends far beyond safeguarding classroom lectures and writings of individual professors.¹¹

In *Regents of the University of California v. Bakke*, Justice Powell summarized this Court's holdings on the issue of academic freedom and reaffirmed that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." 438 U.S. 265, 312 (1978). See *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring). Institutional academic freedom—the university's right to some degree of autonomy—is a necessary corollary of the First Amendment rights of the individual university professor. See Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* Yale L.J. (forthcoming); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Calif. L. Rev. 1538, 1549-1551 (1981). Such corollary constitutional rights are recognized in order to make the "express guarantees fully meaningful." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). See *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958) (right of association); *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972) (right of news gathering); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (right to control education of one's children). In an analogous First Amendment context,

¹¹ No one would dispute that the content of the speech of individual university professors is entitled to First Amendment protection from unjustified government intervention. See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). "[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603; see *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

the right to free exercise of religion clearly is an individual right, yet the Court has recognized that adequate protection of that right requires extension of a corollary right of autonomy to religious institutions. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987); *id.* at 341-342 (Brennan, J., concurring); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-451 (1969); *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

Whatever the parameters of the university's right to academic freedom, it is clear that the "freedom of a university to make its own judgments as to education" includes the institutional right of the university to determine, through its own processes, whom it will permit to teach. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)); see *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . autonomous decisionmaking by the academy itself." (citations omitted)). Indeed, the first among the "four essential freedoms of a university" recognized by Justice Frankfurter in his concurring opinion in *Sweezy v. New Hampshire* was the institutional right to "determine . . . on academic grounds who may teach." 354 U.S. at 263 (emphasis added); see *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952).

This particular aspect of academic freedom derives, in large part, from the university's and the faculty's freedom of association. See Kroll, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 Urban L. Ann. 107, 115 (1977); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (First Amendment protects right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"); *Board of Di-*

rectors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987). Of course, freedom of association “presupposes a freedom not to associate” (*Roberts*, 468 U.S. at 623); in the academic context, that freedom includes the freedom of the university (and its faculty) to employ appropriate academic criteria and procedures in determining with whom they will permanently associate.¹²

Over the long run, a university determines “who may teach” by the process of awarding tenure. The decision to grant, or not to grant, tenure therefore is at the core of academic freedom; it is through the award of tenure that a university charts the course of teaching and scholarship for decades to come. See Affidavits of Sheldon Hackney, President of the University of Pennsylvania, at 2; Aaron Lemonick, Dean of Faculty, Princeton University, at 3-4; Ronald E. Frank, Dean of the Krannert Graduate School of Management and the School of Management, Purdue University, at 1-2; Clinton A. Phillips, Dean of Faculties, Texas A&M University, at 4.¹³

¹² The right to determine “who may teach” also is grounded in the right to free speech. The right to autonomy in hiring implicates the university’s freedom of speech because a decision to grant tenure is, in effect, a decision to provide a particular speaker with a lifetime forum for the dissemination of ideas. Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 Wash. U.L.Q. 445, 446-47 (1987) (“faculty selection is an essential component in controlling the ‘idea’ content of education”); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 Harv. L. Rev. 879, 881-885 (1979).

¹³ These affidavits, which were filed as Attachments to the Memorandum in Support of Plaintiff’s Motion for Summary Judgment in *Trustees of the University of Pennsylvania v. EEOC*, No. 87-1199 (D.D.C. June 30, 1988) have been lodged with the Clerk of the Court. See *supra* note 6.

In essence, an award of tenure is a lifetime contract, which guarantees the tenured professor the freedom to “investigate and discuss the problems [in his or her field] and to express his conclusions, whether through publication or in the instruction of students, without interference” Lovejoy, *Academic Freedom*, reprinted in *The American Concept of Academic Freedom in Formation* (W. Metzger ed. 1977).¹⁴ Tenure is important to the individual professor because it provides freedom to speak and to publish unconstrained by outside pressures. AAUP 1940 Statement; see Affs. of Mayer N. Zald, Professor of Sociology and Social Works, University of Michigan, at 2-3; James O. Freedman, President of Dartmouth College, at 2; Aaron Lemonick, Dean of Faculty, Princeton Univ., at 3.¹⁵

The tenure system also is important to the university in ensuring consistent quality of scholarship and teaching. Even more important, the university’s tenure system determines, over the long run, what the university itself will be. The faculty is the university. It is the faculty members who determine the priorities, the character and the quality of the institution. In making tenure decisions, therefore, a university is doing nothing less than shaping its own identity. See Affs. of Clinton A. Phillips, Dean of Faculties, Texas A&M Univ., at 2,4; Sheldon Hackney, Pres. of the Univ. of Penn., at 2; James N. Rosse, Vice President of Stanford University, at 1-2.

¹⁴ See Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law & Contemp. Probs. 447 (1963); American Ass’n of University Professors, Statement of Principles on Academic Freedom and Tenure (1940) (“AAUP 1940 Statement”), reprinted in *AAUP Policy Documents & Reports* (1984).

¹⁵ This Court previously has held that tenure is a property right subject to due process protection. See *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

The peer review process in turn is probably *the* essential element of the operation of a tenure system. See Affidavits of Paul J. Mishkin, Professor of Law, University of California, Berkeley, at 2-3; Mayer N. Zald, Professor of Sociology at University of Michigan, at 3-4; Harry C. Payne, Acting President of Haverford College, at 3; J. Rapp, Education Law § 6.07[4] (1986). A properly functioning peer review system requires the faculty bodies to obtain candid and detailed written evaluations of the tenure candidate's scholarship—both from the candidate's peers at the university and from scholars at other institutions. See Affs. of Ronald E. Frank, Dean of Management Schools, Purdue Univ., at 2-3; John Brademas, Pres. of New York University, at 3; James O. Freedman, Pres. of Dartmouth College, at 2; see Report of the Committee on Confidentiality in Matters of Faculty Appointment, U. Chi. Rec. 165, 168 (May 22, 1979).

Evaluations prepared by scholars outside the university may be particularly important to the proper evaluation of a tenure candidate.¹⁶ Such evaluations historically have been provided on an entirely voluntary basis, as part of a scholar's obligation to the profession. Internal evaluations, which are provided by the persons who would become the candidate's closest colleagues if tenure is granted, are vital in shaping the associational relationships within the institution. All peer review evaluations traditionally have been provided with express or implied

¹⁶ Because of the degree of specialization inherent in much scholarship, it may be necessary to go outside the university in order to obtain the opinions of the persons best qualified to judge the originality and value of particular scholarly works. For example, the faculty at a small or medium sized college might not be in a position to judge the scholarship of a tenure candidate who is a Chaucerian specialist without going outside the university. See Affs. of Clinton A. Phillips, Dean of Faculties, Texas A&M Univ., at 3. See also, Mayer N. Zald, Prof. of Sociology, Univ. of Mich., at 3.

assurances of confidentiality. See Affidavits of Ronald E. Frank, Dean of Management Schools, Purdue Univ., at 3; John Brademas, Pres. of NYU, at 3; Harry C. Payne, Acting Pres. of Haverford College, at 2. In sum, the confidentiality of the peer review process is critical to the ability of a university to exercise a core element of academic freedom—to determine pursuant to its own standards and processes which members of the faculty should receive tenure. See American Council on Education, Guidelines for Colleges and Universities, No. 7 (Dec. 1981) ("Most educators believe that confidentiality . . . is crucial to [the peer review] process"); see also *infra*, pp. 25-26.¹⁷

B. Confidential Peer Review Materials Are Entitled To Protection Under A Federal Common Law Qualified Privilege

1. The federal law of privilege is codified at Federal Rule of Evidence 501, which provides in relevant part:

Except as otherwise required [by the Constitution, federal statute or Supreme Court rule] . . . , the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. R. Evid. 501.¹⁸ This flexible approach to the adoption of evidentiary privileges under Rule 501 clearly ap-

¹⁷ See Byrne, *Academic Freedom*, Yale L.J. (draft, 5/24/89, p. 126) (forthcoming) ("academic freedom has no meaning without peer review"); Hill & Hill, *Employment Discrimination: A Roll-back of Confidentiality in University Tenure Procedures?*, 22 Am. Bus. L.J. 209, 210-212 (1984) ("There is a very close, probably indispensable, relationship between academic freedom and the peer review process.").

¹⁸ The original proposed draft of Article V of the Rules of Evidence, as approved by this Court and sent to Congress in 1972, was

plies to an EEOC subpoena enforcement proceeding in federal court. Federal Rule of Evidence 1101(b) provides that the evidentiary rules "generally" should be applied in all "civil actions and proceedings," including "contempt proceedings." Fed. R. Evid. 1101(b). Rule 1101(c) specifies that the

rule with respect to privileges applies at *all* stages of *all* actions, cases and proceedings.

Fed. R. Evid. 1101(c) (emphasis added). Because a subpoena enforcement action constitutes a federal court "proceeding" not otherwise exempted from coverage, the Federal Rules of Evidence—including Rule 501—must be applied.¹⁹

drastically different from the existing rule. See Proposed Federal Rules of Evidence, 56 F.R.D. 183, 230. That section enumerated nine specific privileges and provided that only those privileges were to be recognized in federal court. 56 F.R.D. at 230-256; see C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5421, at 647-652. The proposed codification of a static federal common law of privileges immediately generated a substantial controversy. See C. Wright & K. Graham, § 5421 at 652-653; 120 Cong. Rec. 40,891 (1974) (remarks of Rep. Hungate, principal author of the revised federal rules). In response, Congress rejected the proposed rule and adopted the present version of Fed. R. Evid. 501, thereby reflecting its "affirmative intention not to freeze the law of privilege." *Trammel v. United States*, 445 U.S. 40, 47 (1980). Instead, Congress intended to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," and leave the door open to change." *Id.* (quoting Rep. Hungate, 120 Cong. Rec. 40,891 (1974)); see 120 Cong. Rec. 2391 (1974); see also Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 Geo. L.J. 613, 640-646 (1976) (discussing testimony by influential groups and individuals urging flexibility to address privilege issues on a case-by-case basis).

¹⁹ The federal court subpoena enforcement proceeding in this case was authorized under 42 U.S.C. § 2000e-9, which incorporates by

2. Some lower federal courts properly have relied on Rule 501 to fashion a federal common law qualified privilege that protects confidential peer review materials from unnecessary disclosures. See *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337 (7th Cir. 1983) ("recognizing a limited academic freedom privilege in the context of challenges to college or university tenure decisions"); *Zaustinsky v. University of California*, 96 F.R.D. 622, 624 (N.D. Cal. 1983), *aff'd without op.*, 782 F.2d 1055 (9th Cir. 1985); see also *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982). Such an approach is consistent with the "principles of the common law" interpreted "in the light of reason and experience" (Fed. R. Evid. 501) and with the decisions of this Court dealing with analogous issues of confidentiality and privilege. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974) (presidential communications and correspondence); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) (grand jury deliberations); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-151 (1975) (pre-decisional governmental deliberations); *Clark v. United States*, 289 U.S. 1, 13 (1933) (petit jury deliberations).

In determining whether to create and apply an evidentiary privilege, this Court employs a balancing test to decide whether "the privilege . . . promotes sufficiently important interests to outweigh the need for probative

reference the National Labor Relations Board's enforcement authority under 29 U.S.C. § 161, including the authority to apply to a "district court of the United States . . . to issue to [a] person an order requiring such person to appear before the Board . . . to produce evidence" The evidentiary rules of privilege, as reflected in Rule 501 consistently have been applied in NLRB enforcement proceedings. See *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *NLRB v. North American Van Lines, Inc.*, 611 F. Supp. 760 (N.D. Ind. 1985); *NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368 (C.D. Cal. 1967); see also *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983).

evidence" *Trammel*, 445 U.S. at 51; see *United States v. Nixon*, 418 U.S. at 711 ("we must weigh the importance of the general privilege of confidentiality of Presidential communications . . . against the inroads of such a privilege on the fair administration of criminal justice").²⁰

In addition to their roles as centers of learning, innovation and discovery, colleges and universities play a central role in promoting the "robust exchange of ideas" in our democracy. *Keyishian v. Board of Regents*, 385 U.S. 589,

²⁰ Professor Wigmore has formulated this common law balancing test in a more detailed fashion. According to Wigmore, a privilege exists when:

1. the communications originate in confidence that they will not be disclosed;
2. the confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;
3. The relationship is one which ought to be sedulously fostered; and
4. the injury that would inure to the relation by the disclosure of the communications is greater than the benefit that would be gained by breach of confidentiality.

8 J. Wigmore, *Evidence* § 2285 (McNaughton ed. 1981); see *ACLU of Miss., Inc. v. Finch*, 638 F.2d 1336, 1343-44 (5th Cir. 1981); *In re Hampers*, 651 F.2d 19 (1st Cir. 1981); *Zaustinsky v. University of California*, 96 F.R.D. 622 (N.D. Cal. 1983), *aff'd without op.*, 782 F.2d 1055 (9th Cir. 1985). Applying this standard, it is clear that (1) peer review materials are provided "in confidence" (*supra* 20-21), (2) confidence is essential to the continued vitality of the peer review system (*supra* 19-21); and (3) the relationship between the individual peer reviewer and the personnel committee (or other tenure decisionmaker) is crucial to the existing tenure system and ought to be fostered (*supra* 19-21); *infra* 25-26. Because the privilege is only a qualified one—and thus the EEOC or other litigant will be able to overcome the privilege upon an appropriate showing—the "burden" imposed by the privilege is minimal and outweighed by the societal interest in promoting the communication.

603 (1967); see *supra* 15-17.²¹ But, to a large degree, the ability of colleges and universities to continue to fulfill their role in society, particularly to provide for innovation in the "marketplace of ideas," is dependent on their continued right to academic freedom, including the freedom to determine "who may teach" and who may engage in research as a representation of the university and thereby expand society's base of knowledge.

At bottom, the quality of a university—and its ability to serve its social function—turns almost entirely on the composition and the quality of its faculty.²² A qualified privilege or other rule of law that would serve to maintain a degree of confidentiality in the peer review process is essential to the university's ability to obtain the frank evaluations necessary to promote the most qualified and most promising teachers and scholars. See *supra* 20-21; *infra* 34-35; see also Report of the Committee on Confidentiality, U. Chi. Rec. 165-66 (1979); American Council of Education, *Guidelines for Colleges and Universities*, No. 7 (1981) ("Most educators believe that confidentiality . . . is crucial to [the peer review] process"); see also Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Calif. L. Rev. at 1559-1560.²³ Thus, the

²¹ It could be argued that the university's contribution to "social progress" is the "ultimate justification for academic freedom." Note, *Preventing Unnecessary Intrusions on University Autonomy*, 69 Calif. L. Rev. at 1545; see also Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law & Contemp. Probs. 447, 453-57 (1963); Note, *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1048 (1968) (the university renders an "invaluable service . . . to society [that] can be performed only in an atmosphere entirely free from . . . constraints on thought and expression").

²² See Smith, *Protecting the Confidentiality of Faculty Peer Review Records*, 8 J. Coll. & Univ. L. 20, 22 & n.9 (1981).

²³ As this Court has noted in another context, "[f]reedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled

societal interest in the peer review system is an important one and a privilege is necessary to protect the continuing vitality of the system.

On the other side of the balance, the EEOC unquestionably has a strong interest in obtaining access to relevant evidence in order to fulfill its congressional mandate to halt discriminatory employment practices in educational institutions. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972); H.R. Rep. No. 238, 92d Cong., 2d Sess. 20, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2154-55. See *infra* 43, 45. Nevertheless, it is far from clear why the EEOC's interest in unrestricted access to relevant information must *always* prevail over the university's interest in ensuring that its tenure process is effective. The importance of access to peer review documents will vary from case to case. Moreover, common sense indicates that it will be an extremely rare situation in which the *only* evidence of invidious discrimination is found in formal, carefully prepared peer review evaluations. Thus, when all readily available evidence demonstrates to the EEOC that there has been no discrimination, it is difficult to see what values are served by insisting that the university's most confidential information must be revealed. Alternatively, if the EEOC is required to review the materials already provided *before* insisting on a breach of the university's pledge of confidentiality, it often should be able to determine whether pursuit of the peer review documents is truly warranted.

Accordingly, the question becomes: should the EEOC's naked desire for access to information be allowed in all cases and under all circumstances to trump the university's need for confidentiality? The answer clearly is no. *Cf. Nixon*, 418 U.S. at 705 (qualified privilege for ex-

disclosure" *United States v. Nixon*, 418 U.S. at 708 n.17 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.C. 1966)).

ecutive branch communications); *Sears, Roebuck & Co.*, 421 U.S. at 150-151 (pre-decisional governmental deliberation privilege); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (attorney-client communication privilege). Application of the qualified privilege will protect the university's—and society's—interest in a functioning peer review process with a negligible or perhaps even non-existent impact on the EEOC's ability to investigate complaints of discrimination in the academic tenure setting.

3. This Court has recognized the need for protection of confidential documents and information in settings which are closely analogous to the academic peer review setting.²⁴ For example, in *United States v. Nixon*, the Court created a qualified privilege for presidential communications. Such a privilege was designed to protect "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." 418 U.S. at 708. In addition, the privilege recognized the need for the President and his advisors to express their opinions "in a way [they] would be unwilling to express their opinions except privately." *Id.*²⁵

In discussing the privilege which protects the "decision-making processes of government agencies," this Court has noted that "the ultimate purpose of this long-

²⁴ This Court, in particular, recognizes the crucial role of confidentiality in the deliberation process. All of the Court's internal discussions and memoranda are kept as secret as possible. Moreover, the Court almost certainly benefits in its own employment decisions from receiving highly confidential recommendations for sensitive positions, such as law clerks. See Aff. of Paul J. Mishkin, Prof. of Law, University of California, Berkeley, at 5.

²⁵ Ultimately, the Court concluded that the qualified privilege would, in the circumstances of that case, have to "yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

recognized privilege is to prevent injury to the quality of agency decisions." *Sears, Roebuck & Co.*, 421 U.S. at 150-151. The Court readily accepted the necessity of the privilege, viz., that

"frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result.

421 U.S. at 150 (quoting the Senate report on FOIA Exemption 5 for documents reflecting agency deliberations).

Similarly, Justice Cardozo, speaking for a unanimous Court on the historic secrecy of grand jury deliberations, explained that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States*, 289 U.S. 1, 13 (1933). See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) ("To make public any part of [grand jury] proceedings would inevitably detract from its efficacy [N]ot only would the participation of the jurors be curtailed, but testimony would be parsimonious").²⁶ The same considerations recognized by the Court in these various circumstances should apply to the issue of whether confidential academic peer review documents should be protected by a qualified privilege.

Finally, additional support for creation of a common law privilege can be found in state law.²⁷ The State of

²⁶ See also *Fisher*, 425 U.S. at 403 (attorney-client privilege serves purpose of "encourag[ing] clients to make full disclosure to their attorneys").

²⁷ Although state privilege law is not binding in the determination whether to recognize a federal common law privilege, "[t]his is not to suggest that the privilege law as developed in the states is irrelevant. This Court has taken note of state privilege laws in

Washington, for example, has adopted a privilege for academic peer review proceedings and materials. Wash. Rev. Code § 28B.10.648; *Hafermehl v. University of Washington*, 628 P.2d 846 (Wash. Ct. App. 1981) (Tenure peer-review materials are exempt from disclosure provisions of Washington's Public Disclosure Act). See *Cockrell v. Middlebury College*, 536 A.2d 547 (Vt. 1987); *Board of Trustees of Stanford University v. Superior Court*, 119 Cal. App. 3d 516 (1981) (reversing order compelling disclosure of faculty review materials). Other states, such as California, have adopted a general statutory privilege for confidential official communications. See Cal. Evid. Code § 1040; Alaska Code of Civil Procedure § 9.25.150; Colorado Code of Court Procedure § 13-90-107(e); Idaho Rules of Evidence § 9-203(5); Kansas Code of Court Procedure § 60-434; Minnesota Civil Code § 595.02(e); and Wash. Rev. Code § 5.60.060(5). In California, that privilege has been held to apply to academic peer review materials in a public university. *Mc-*

determining whether to retain [a common law privilege] in the federal system." *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980). See *Trammel*, 445 U.S. at 48-50 (examining status of privilege law in the states and in Great Britain in determining whether to recognize federal privilege against adverse spousal testimony).

In determining what the "principles of the common law . . . in light of reason and experience" require, the courts clearly are justified in examining state case law and statutes. That language of Fed. R. Evid. 501 can be traced back through "former Criminal Rule 26 to its point of origin in the decisions of the Supreme Court in *Wolfe v. United States*, [291 U.S. 7 (1934)] and *Funk v. United States*, [290 U.S. 371 (1933)]." C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5425 at 709. In applying the standard that was ultimately incorporated in Rule 26 (and later in Fed. R. Evid. 501), this Court looked for guidance to all "general authority" including the spirit of relevant federal and state legislation. *Id.*; see *Ex parte United States*, 101 F.2d 870, 877 (7th Cir. 1939) (standard for determining existence of privilege is to look to "the spirit of modern legislation, and trend of decisions").

Killop v. Regents of the University of California, 386 F. Supp. 1270 (N.D. Cal. 1975).²⁸

The states also have adopted evidentiary privileges in closely analogous contexts. For instance, all 50 states have adopted an evidentiary privilege that protects confidential peer review documents in the medical context. American Medical Association, *A Compendium of State Peer Review Laws*, vi (1988).²⁹ The privilege is designed to encourage frank and open peer review evaluations by preventing disclosure of such documents in litigation.³⁰ Most of these peer review privilege statutes apply not only to medicine but to other professions, including dentistry, psychology, pharmacology and others. See, e.g., Arkansas Code of Public Health and Welfare §§ 20-9-501, 20-9-503; Alabama Civil Code § 6-5-333; Indiana Code of Civil Procedure § 34-4-12.6-1 through 6-3; Mary-

²⁸ In applying the California statute, a federal court concluded that "the University's need to preserve the confidentiality of the tenure files in question decisively outweighs the plaintiff's need for their production [and therefore] the materials sought are privileged under § 1040(b)(2) of the California Evidence Code." *Id.* at 1278.

²⁹ Most of these statutes protect peer review materials from individuals who seek to challenge decisions concerning their own employment. *Compendium* at vi. See *Kappas v. Chestnut Lodge*, 709 F.2d 878 (4th Cir.), cert. denied, 464 U.S. 852 (1983) (interpreting Maryland statute); *King v. Bartholomew Cty. Hosp.*, 476 N.E.2d 877 (Ind. Ct. App. 1985); *Doe v. Iowa State Bd. of Physical Therapy & Occupational Therapy Examiners*, 320 N.W.2d 557 (Iowa 1982).

³⁰ The academic privilege also is analogous to the well-recognized privilege that protects the identity of a government informant; both privileges are designed to encourage a form of forthright disclosure and comment that best serves the public interest. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informant privilege is recognized in both federal court, *Roviaro*, 353 U.S. 53, and many states. See *State v. Haverty*, 267 S.E.2d 727 (W. Va. 1980).

land Code of Health Occupations § 14-601; Pennsylvania Code of Professions and Occupations §§ 425.1 through 425.4; Wis. Public Health Statutes § 146.38.³¹

³¹ The EEOC has relied upon *Herbert v. Lando*, 441 U.S. 153 (1979), to support its argument that no privilege should be recognized in this case. But the Court in *Herbert* held that discovery, in a libel case, of prepublication editorial discussions would not significantly affect the frankness of the exchanges between reporters and editors and therefore a privilege was not necessary. 441 U.S. at 173-174. Here, by contrast, it is clear that disclosure of the peer reviews will significantly alter the exchanges between peers and university officials and will cause some reviewers to refuse to provide any evaluations. See *infra* 34-37. The interference with an important and socially useful activity is much more destructive in this case than in *Herbert* and therefore a privilege should be recognized.

The Court in *Herbert* also noted that, even in that setting, the government is precluded from engaging in "casual inquiry" to serve "the public interest." 441 U.S. at 174. But that is precisely what the EEOC is doing here. Although it is true that a complainant has made a specific charge of discrimination against the University, the EEOC's insistence that it must examine confidential documents before it determines whether there is even one shred of evidence to support the charge of discrimination is nothing more than a claim that discovery is necessary to protect the public interest. Compare *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct"). Moreover, in *Herbert* the defendants could have pretermitted an inquiry into their state of minds by showing that the publication was true. Here, by contrast, the University is helpless under the Third Circuit's analysis to prevent disclosure of its confidential documents once a discrimination charge is filed with the EEOC.

C. Requiring Disclosure Upon Demand Of Confidential Peer Review Documents Results In An Infringement Of The University's First Amendment Rights And Improperly Disregards The University's Qualified Academic Privilege

The Third Circuit's opinion in *Franklin & Marshall*, which was expressly reaffirmed by the court below, acknowledged that

confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review, and, thus, has been essential to the determination of "who may teach,"

Pet. App. 45. The *Franklin & Marshall* court also conceded that its holding, requiring disclosure of peer review documents, "may perhaps burden the tenure review process in our nation's universities and colleges." Pet. App. 47. In fact, the court significantly understated the impact of its ruling.

A rule of law that requires confidential peer review evaluations to be disclosed based on nothing more than the filing of an administrative or judicial complaint will severely undermine the existing process of academic tenure and therefore result in a significant infringement of the right of academic freedom.³² At the outset, it cannot

³² The argument that judicially compelled disclosure of confidential information infringes the First Amendment is not a novel one. In *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958), this Court adopted the NAACP's argument that "the effect of compelled disclosure of [its] membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs." *Id.* at 460. The Court recognized that the order to produce the documents did not constitute a "direct action . . . to restrict the [First Amendment] right of petitioner's members" but held that in "the domain of these indispensable liberties, . . . abridgment of such rights, even though unintended, may inevitably follow from varied forms of government action." *Id.* at 461. Thus, after observing that "[i]nviolability of

be assumed that any disclosures made to the EEOC will be held in confidence by the agency. To the contrary, EEOC regulations permit disclosure of documents obtained in the course of an investigation to the charging party, to other state and federal agencies and, where the EEOC deems it necessary, even to potential witnesses. 29 C.F.R. § 1601.22.³³

In *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), this Court affirmed the interpretation of Title VII reflected in the EEOC's regulation, holding that the statutory language that precludes EEOC disclosure to the "public" does not include the charging party. The clear result of the EEOC's regulation is that "direct disclosure [of confidential materials] may be made to a fairly large group of persons who can then pass the information along to others." *Associated Dry Goods*, 449 U.S. at 607 (Stevens, J., dissenting).³⁴

privacy in group association may in many circumstances be indispensable to preservation of freedom of association," the Court concluded that the state's request for the confidential information was simply too broad and unnecessary, particularly in light of the fact that the NAACP—like the University—had "complied satisfactorily with the production order, except for" the confidential materials. *Id.* at 462, 464-465. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (statute requiring disclosure of names of contributors to minor political party violates "privacy of association and belief guaranteed by the First Amendment"); see also *Public Citizen v. Department of Justice*, No. 88-429, slip op. at 22 (June 21, 1989) (Kennedy, J., concurring) ("The mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution . . . is enough to invalidate the Act").

³³ Of course, "even disclosure to the EEOC itself would have" some "chilling effect" on "academicians' willingness to provide candid and frank peer evaluations." *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337 n.2 (7th Cir. 1983).

³⁴ The Commission's rules do require that the persons to whom investigation results are disclosed must "agree" not to pass such information along, but there are no sanctions for the violation of

There is no question that adoption of a national rule of law that permits *routine* disclosure of confidential peer review materials will have a "chilling effect" on candid evaluations and discussions of candidates. Affs. of Clinton A. Phillips, Dean of Faculties, Texas A&M Univ., at 5; James N. Rosse, Vice Pres. of Stanford Univ., at 5; James O. Freedman, Pres. of Dartmouth College, at 3 (scholars "best suited" to critique others' work "will refuse" to do so if confidentiality is not assured). As this Court noted in a related context,

[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.

United States v. Nixon, 418 U.S. 683, 705 (1974).³⁵

Indeed, concern that peer review evaluations cannot be kept confidential already has led to instances of refusals by outside evaluators to participate in the process. See Affs. of Robert B. Stevens, Chancellor of the University of California, Santa Cruz, at 3-4; John P. Fackler, Jr., Dean of the College of Science, Texas A&M Univ., at 3-4; William P. Pierskalla, Deputy Dean for Academic Af-

such agreements. The EEOC argued in *Associated Dry Goods* that it could seek contractual remedies for violation of an agreement not to disclose, see 449 U.S. at 607 n.4, but of course such a remedy could not "undo" the injury of disclosure. Moreover, to the best of petitioner's knowledge, the EEOC never has undertaken any action, formal or informal, to enforce any such "agreements."

³⁵ See Report of the Committee on Confidentiality in Matters of Faculty Reappointment, U. Chi. Rec. 165 (May 22, 1979) ("Nowhere is the expectation of confidentiality more important than in the [faculty] appointive process. . . . Confidentiality of the deliberations by members of the deliberative body and by those within the University to whom recommendations are transmitted is necessary for effective self-government of a university organized on a collegial basis"); see also Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Calif. L. Rev. at 1551.

fairs, Wharton School, Univ. of Penn., at 5-6. Where evaluations continue to be provided, the loss of confidentiality, with its consequent reduction in candid and thorough comment on the candidate's work, significantly undermines the value and integrity of peer review. See Affs. of Mayer N. Zald, Prof. of Sociology, Univ. of Mich., at 5-6; John Brademas, Pres. of NYU, at 5; Ronald E. Frank, Dean of Management Schools, Purdue Univ., at 3.³⁶

As the quality of peer review evaluations declines, tenure committees will no longer be able to rely on them. This will work to the detriment of universities, as less qualified persons achieve tenure causing the quality of instruction and scholarship to decline.³⁷ Compelling disclosure of such materials also will result in divisiveness and tension, placing strain on faculty relations and impairing the free interchange of ideas that is a hallmark of academic freedom. See Affs. of Paul J. Mishkin, Prof.

³⁶ In the grand jury context, this Court has recognized that "in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the *possible effect upon the functioning of future grand juries*." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979) (emphasis added). Thus, although the effects of occasional compelled disclosures are difficult to measure, a decision from this Court requiring the documents in dispute to be routinely disclosed will have a significant, damaging effect on the functioning of future tenure committees and peer review evaluators.

³⁷ The Seventh Circuit has stated that the "peer review process is essential to the very lifeblood and heartbeat of academic excellence The process of peer evaluation [is] the best and most reliable method of promoting academic excellence and freedom" *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983). Similarly, the Third Circuit has stated that the "peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Kunda v. Muhlenberg College*, 621 F.2d 532, 547-548 (3d Cir. 1980). See Hill & Hill, *Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?*, 22 Am. Bus. L.J. 209, 210-212 (1984).

of Law, UCB, at 6; John Brademas, Pres. of NYU, at 5-6; Robert B. Stevens, Chancellor of UCSC, at 3.

Finally, a rule of law that allows routine dissemination of confidential peer review materials will work to the detriment of tenure candidates. As written peer review evaluations become more vague and bland, because of the threat of disclosure, decisionmakers may be inclined to place increasing reliance on oral and undocumented evaluations that do not inspire the same degree of thoughtfulness, fairness and accuracy as those produced under the existing system. Affs. of Robert B. Stevens, Chancellor of UCSC, at 4 (reliance on oral critiques is "fraught with possibilities for favoritism, discrimination and error"); Clinton A. Phillips, Dean of Faculties, Texas A&M Univ., at 5 (the university would be "forced to rely on" oral comments and "all the possibilities of bias and error" that they might entail); Harry C. Payne, Acting Pres. of Haverford College, at 3.³⁸

In sum, the rule adopted by the court below, which essentially provides for disclosure of confidential peer review documents "on request," has had, and will continue to have, a deleterious effect on the tenure process which exists at all major American colleges and universities.³⁹

³⁸ Although universities and their faculties would continue to strive for fairness and accuracy in tenure evaluations, the increased level of informality that would result from the adoption of a broad disclosure rule ultimately could disadvantage the very class of persons whose interests Congress intended Title VII to advance. As Professor David Riesman has explained, "the experience of . . . academicians is that, when confidentiality cannot be guaranteed, letters lose all credibility. The advantage lies not with those previously discriminated against, but with those in the appropriate network who can have sponsors telephone on their behalf." *Chronicle of Higher Educ.*, Sept. 29, 1980, at 24.

³⁹ Thus, while the EEOC's unyielding advocacy of the broadest possible investigatory authority may be appropriate in the vast majority of cases, see *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), the impact of the EEOC's position in this case demonstrates the validity of this Court's observation that "principles developed for

Because the tenure process—the primary control over "who may teach"—is a central component of the academic freedom protected by the First Amendment, the application of the rule mandating automatic disclosure of confidential peer review documents constitutes a significant infringement of the petitioner's First Amendment rights.⁴⁰

II. THIS COURT SHOULD CONSTRUE THE SUBPOENA ENFORCEMENT PROVISION OF TITLE VII NARROWLY TO AVOID CREATING A SUBSTANTIAL CONSTITUTIONAL QUESTION

Both the court below and the Third Circuit panel in *EEOC v. Franklin & Marshall College* adopted a construction of the Title VII enforcement provision that gave rise to a substantial First Amendment issue. See *supra* 15-21, 32-36. That result readily could have been avoided by following certain fundamental rules of statutory construction. First, the court of appeals disregarded this Court's clear requirement that, wherever reasonably possible, a statute should be construed in a manner that

use in the industrial setting cannot be "imposed blindly on the academic world;" *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980) (citations omitted). As this Court has noted in a variety of contexts, see, e.g., *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), academic decisionmaking is different, both in substance and process, from the usual commercial or administrative decision that courts readily review. The tenure process—by which "employees" are recommended for "promotion" by their peers and not by their supervisors or by management—certainly is rarely found outside the university. Thus, this Court should continue to recognize that the application to academic life of legal standards designed for a commercial context "likely will destroy something uniquely valuable in higher education." Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* Yale L.J. (draft 5/24/89, p. 140) (forthcoming) (discussing *Horowitz* case).

⁴⁰ For the same reasons, a rule which requires disclosure upon demand is inconsistent with the existence of a qualified common law privilege. See *supra* 22-31. Indeed, the Third Circuit in *Franklin & Marshall* expressly "decline[d] to . . . recogniz[e] a qualified academic privilege . . ." Pet. App. 44.

avoids creation of a constitutional question. See *Escambia County, Florida v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In this case, the constitutional conflict could have been avoided simply by construing the subpoena enforcement provisions of Title VII to respect the confidentiality of privileged information, which is a reasonable interpretation—particularly in light of Congress' decision to require federal court enforcement of EEOC subpoenas. Second, the court below erred in presuming that Congress would choose to invade constitutionally protected activities and cast aside common law privileges. Instead, the court of appeals should have required a clear statement from Congress prior to adopting a construction of the statute that authorized the EEOC to probe intrusively into the confidential tenure files of the university.

A. This Court Should Narrowly Construe The Subpoena Enforcement Provision Of Title VII To Provide A Qualified Privilege For Confidential Peer Review Materials

The court of appeals' analysis of Congress' intent erroneously merged Title VII's grant of EEOC *investigatory* power and the grant of EEOC *enforcement* power. Title VII vests the EEOC with broad power to seek access to all evidence that may be "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). However, with respect to the enforcement of that investigatory authority, the statute simply provides that the powers conferred upon the National Labor Relations Board (the "NLRB") by 29 U.S.C. § 161 "shall apply." 42 U.S.C. § 2000e-9. Section 161, in turn, provides that, if any person fails to respond to a subpoena issued by the NLRB,

any district court . . . , upon application by the [NLRB] shall have jurisdiction to issue to such per-

son an order requiring such person to . . . produce evidence if so ordered . . . and any failure to obey such order of the court may be punished by said court as a contempt thereof.

29 U.S.C. § 161. Consequently, a proper understanding of Congress' intent with respect to the EEOC's enforcement powers requires an examination not only of the investigatory power under Section 2000e-8(a), but also of the enforcement power granted to the NLRB under Section 161 and the significance of the requirement that the EEOC must initiate a federal court proceeding in order to enforce any subpoena it issues.

While the Third Circuit correctly concluded that the EEOC's investigatory subpoena power "is limited by the standard of relevance," see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984), the court nowhere acknowledged that the EEOC's subpoena enforcement power is conferred in an entirely different statutory provision. The Third Circuit erred in implicitly concluding that satisfaction of Section 2000e-8(a)'s "relevance" requirement automatically entitled the EEOC to subpoena enforcement. Such an approach ignores the fact that Congress specifically envisioned a judicial role in the *enforcement* of the EEOC's investigatory powers. The plain language of Section 161 does not require the district court to enforce blindly any subpoena issued by the EEOC. To the contrary, the statute merely grants district court "jurisdiction" to enter an order requiring a person to produce evidence to the NLRB "if so ordered."⁴¹

Section 161 (and, by reference, the EEOC subpoena enforcement provision under Section 2000e-9) is properly

⁴¹ The fact that Congress chose to interpose the judicial branch as a "buffer" between the EEOC's broad investigatory power and the public is significant in itself. Of course, it is particularly important in this case because of the judicial apprehension over compulsory process powers when they intrude upon First Amendment rights, "particularly in the academic community." See *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

construed to incorporate all of the relevant constitutional and common law defenses to an agency or judicial subpoena. There has been no suggestion that Congress, in passing the National Labor Relations Act, intended to obliterate existing evidentiary privileges and standards. Thus, EEOC subpoenas—like any other subpoena—may be quashed if issued in bad faith or for the purpose of harassment. See *United States v. Powell*, 379 U.S. 48, 58 (1964); cf. *EEOC v. Packard Electric Division, General Motors Corp.*, 569 F.2d 315, 318 (5th Cir. 1978) (invoking the court's equitable powers to require consideration of the subpoena's reasonableness and hardship). In addition, at least one court of appeals has suggested that "harm [to] the public interest" may give rise to evidentiary privileges under Section 161. See *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 731 (D.C. Cir. 1983).

More fundamentally, Section 161—like every other statute—must yield to legitimate claims based upon First Amendment rights. See *Drukker Communications*, 700 F.2d at 730. Lower courts also have correctly construed Section 161 not to empower the NLRB to override pre-existing privileges such as the normal attorney-client privilege, *NLRB v. Harvey*, 349 F.2d 900, 906-07 (4th Cir. 1965), or the attorney work-product rule. See *NLRB v. Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 289 (2d Cir. 1950), cert. denied, 342 U.S. 812 (1951).⁴² There is no basis to assume that any other common law privi-

⁴² Both this Court and the lower federal courts have recognized in a variety of contexts that administrative agency subpoenas are subject to existing privileges. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (IRS); *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980) (FTC) (applying privilege but finding no communications with clients); *SEC v. First Security Bank of Utah*, 447 F.2d 166, 167 (10th Cir. 1971) (SEC) (applying privilege but finding no confidential communications); *Civil Aeronautics Bd. v. Air Transp. Ass'n of America*, 201 F. Supp. 318, 318 (D.D.C. 1961) (CAB).

lege would be less applicable. Thus, despite the broad grant of investigatory power to the EEOC, Section 161—properly construed—incorporates and is limited by the normal rules of privilege.

The Third Circuit failed to apply this analysis of Section 161. Rather than determining whether a privilege could be interposed under that provision, the Third Circuit concluded that the *absence* of any specific reference to an academic privilege in the statute or its legislative history required that the privilege be rejected and that the court automatically enforce a subpoena for any "relevant" material. Pet. App. 47.⁴³ By so construing the statute, the Third Circuit reached a conclusion that—by its own admission—resulted in a "burden" (*id.*) on the University's right to determine "who may teach." See *supra* 18-21. The court below readily could have avoided that "burden" by adopting the reasonable construction of the enforcement provision that permits a qualified common law privilege for confidential peer review materials (as well as other defenses) to be interposed in an EEOC subpoena enforcement proceeding.

B. This Court Should Not Construe The Enforcement Provision Of Title VII To Intrude Upon First Amendment Rights Absent A Clear Statement From Congress

The court in *Franklin & Marshall* erred in presuming that Congress intended, in Sections 2000e-8(a) and 2000e-9, to grant the EEOC the authority to intrude on the University's First Amendment rights and in re-

⁴³ It seems inconceivable that the EEOC is entitled to require an attorney for the University to be deposed concerning communications between University officials and the attorney in connection with the latter's representation in this matter simply because Title VII nowhere specifically protects the attorney-client privilege. But, the Third Circuit's logic would justify such an order because nothing in the legislative history of Title VII specifically precludes such discovery.

quiring the University to produce evidence in the legislative history of Title VII of a specific congressional intent to deny the EEOC such powers. Because the Third Circuit found no express limitation on the EEOC's subpoena authority, the court upheld the admittedly intrusive and unjustified discovery request in this case. See Pet. App. 47; *Franklin & Marshall College*, 775 F.2d at 115, cert. denied, 476 U.S. 1163 (1986).

This Court repeatedly has held that proper statutory interpretation should begin with precisely the opposite presumption—viz., that Congress does not intend to infringe upon First Amendment interests. *NLRB v. Catholic Bishop*, 440 U.S. 490, 504 (1979); *Lowe v. SEC*, 472 U.S. 181, 189-190 (1985); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). If the court of appeals had approached the issue properly, it would have quashed the subpoena unless it found a clear statement of congressional intent to extend the EEOC's subpoena authority into—or at least to the limits of—a constitutionally protected area. See *NLRB v. Catholic Bishop*, 440 U.S. 490, 504 (1979); *Public Citizen v. Department of Justice*, No. 88-429, slip op. at 25 (June 21, 1989) (“we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils”).

In *Catholic Bishop*, this Court refused to construe the NLRA in a manner which might give rise to an infringement of First Amendment rights absent a “clear expression of an affirmative intention of Congress” to do so. *Id.* at 504. Recognizing the “critical and unique role of the teacher” in a religious school, the Court interpreted the NLRB's jurisdiction not to reach such a teacher because a contrary interpretation would create “a significant risk” that the First Amendment would be infringed. See *id.* at 501-02. In this case, there is at least as great a risk of First Amendment confrontation if the Third Circuit's interpretation of the statute is upheld. See *supra* 32-37. Accordingly, the holding below that the

EEOC has virtually unlimited discretion to order disclosure of confidential tenure materials should be rejected absent a clear statement of congressional intent to grant such authority.

There is no such intent in this case. To be sure, the University is included within the organizations that Congress intended to cover when it amended Title VII in 1972. However, it is noteworthy that the “education” exemption that was eliminated by Congress in 1972 included all “educational institutions”—not just colleges and universities. See H.R. Rep. No. 238, 92d Cong., 2d Sess. 19-20, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2154-55. Thus, it is unlikely that any member of Congress gave any specific consideration to the effect of the amendment on the university tenure process; indeed tenured faculty represent just a minute fraction of the millions of teachers, administrators, clerical employees and maintenance employees who were covered by the “educational institution” exemption. See S. Rep. No. 415, 92d Cong., 2d Sess. 9-12 (1971) (educational institutions extended Title VII's scope for an additional 4 million teachers and staff employees).

The Third Circuit clearly erred in inferring from Congress' decision to include educational institutions within the coverage of Title VII that there was any intent to compel disclosure of confidential peer review documents. No such inference is reasonable and in any event is wholly inadequate to constitute a “clear statement” of congressional intent to authorize the EEOC to engage in a wholesale invasion of academic freedom.⁴⁴

⁴⁴ The legislative history indicates only that Congress wanted to provide an “effective federal remedy” for employment discrimination in the education context. See S. Rep. No. 415, 92d Cong., 2d Sess. 11 (1971). In justifying the inclusion of colleges and universities in the 1972 Amendment, Senator Harrison Williams, a sponsor of the bill, pointed out that “employees of this Nation's educational institutions . . . go without an adequate Federal remedy.” 118 Cong. Rec. 1993 (Feb. 1, 1972) (statement of Sen.

III. A RULE REQUIRING DISCLOSURE UPON DEMAND OF CONFIDENTIAL PEER REVIEW MATERIALS IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST AND IS ACCORDINGLY UNCONSTITUTIONAL

The Third Circuit, both in the decision below and in *Franklin & Marshall*, recognized that the university defendants had raised "nonfrivolous first amendment concern[s]" (Pet. App. 22, 45), but held that those concerns were outweighed by Congress' "intent" to allow the EEOC access "to all that is relevant to the charge under investigation." Pet. App. 47, 48. In discerning Congress' intent with respect to the issue at hand, the Third Circuit relied on Congress' "refusal to exempt academic institutions from Title VII's prohibition against discrimination". Pet. App. 45-46. But this is plainly an inappropriate analysis under the First Amendment.⁴⁵

Any governmental action which infringes a fundamental constitutional right, such as academic freedom, is "presumptively unconstitutional." *Harris v. McRae*, 448 U.S. 297, 312 (1980), quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Thus, unless the Court adopts a construction of Section 2000e-9 or Fed. R. Evid. 501 which eliminates the infringement of the University's

Williams); see H.R. Rep. 238, 92d Cong., 2d Sess. 20, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2155-56. There is no evidence whatsoever that Congress intended the application of Title VII to interfere without justification with academic freedom, including the confidentiality of peer review evaluations.

⁴⁵ Indeed, the *Franklin & Marshall* court—after acknowledging the facial validity of the university's claim of academic freedom—seemed to suggest that the validity and weight of the university's First Amendment interest was subject to congressional control. Thus, the court stated that "[i]n assessing the importance of the academic freedom principles at issue, our starting point is an examination of Congress' intent in enacting and amending Title VII legislation." 775 F.2d at 109, cert. denied, 476 U.S. 1163 (1986).

First Amendment rights, see *supra* 37-43, the EEOC bears the burden of showing that its investigative efforts, as applied to the University in this case, are (1) intended to achieve a compelling governmental interest, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-842 (1978); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Shelton v. Tucker*, 364 U.S. 479, 487-490 (1960); and (2) narrowly tailored to serve that interest, *Bellotti*, 435 U.S. at 793-795; *Landmark Communications, Inc.*, 435 U.S. at 841-842; *Shelton*, 364 U.S. at 487-490. The EEOC cannot satisfy these requirements by reference to congressional silence. Indeed, the EEOC's approach cannot withstand scrutiny under the First Amendment.

Although petitioner readily concedes that the EEOC has a compelling interest in eliminating all invidious discrimination in employment, including any that occurs in the academic world, there is no evidence that unbridled access by the EEOC to confidential tenure review files is necessary to further that compelling interest. Certainly Congress has never made any findings to that effect. See *supra* 43.

Moreover, creation of a qualified privilege derived from the First Amendment that will permit a proper balancing of the "vital constitutional and societal interests on a case-by-case basis in accord with the tried and traditional way of adjudicating such questions." *Branzburg v. Hayes*, 408 U.S. at 710 (Powell, J., concurring). See *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). Thus, the inquiry proposed by petitioner is neither novel nor burdensome to the EEOC or the courts. In contrast to the absolutist approach of the court of appeals and EEOC, the proper analysis would involve a two-step inquiry: (1) determine whether the material is "presumptively privileged," i.e., within the class of confidential information; and (2) determine whether, based on a variety of factors, the party seeking the material has demon-

strated a specific reason for disclosure that "outweighs" the university's interest in confidentiality. *Notre Dame*, 715 F.2d at 338. See *United States v. Nixon*, 418 U.S. 683, 708-713 (1974); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959).

In this case, there is no dispute that the materials are confidential and therefore under the proposed inquiry should be accorded a qualified immunity. In addition, the EEOC has made no attempt to show any reason that would justify overriding the privilege that attaches to the various documents at issue. Thus, the subpoena should have been quashed.

Although there is no reason for the Court to undertake an exhaustive evaluation of the appropriate considerations that a trial court should take into account in deciding whether a particularized reason for disclosure has been presented, it is clear that the EEOC should be able to obtain access to confidential information in those cases where it appears that those files will substantially promote the factfinding process. Thus, for instance, if the university relies upon the confidential letters to justify its tenure decision, it often will be necessary to have those documents made available to the EEOC. See *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).⁴⁶ Disclosure also may be more appropriate in the event that the academic institution has failed to provide either the complainant or the EEOC with a statement of reasons for the denial of tenure.

⁴⁶ No doubt, the EEOC will suggest that petitioner's proposed "balancing" test would not obviate the harms to academic freedom because it would still leave open the possibility that confidential peer review material would be disclosed. However, it is the routine disclosure of such materials that chills frank discussion and engenders disharmony. *Gray v. Board of Higher Education*, 692 F.2d 901, 908 (2d Cir. 1982). As this Court has recognized in applying a qualified privilege in other contexts, *see supra* 26-28, the difference between the knowledge of certain disclosure and the risk of infrequent disclosure is a meaningful one.

See *Gray*, 692 F.2d at 907-908. In addition, if the EEOC uncovers substantial evidence of discrimination in the non-confidential information made available to the Commission, then there may be a need for access to peer review materials.⁴⁷ In sum, requiring the EEOC to make a particularized showing that it has some reason to look into the University's confidential tenure files is not an insurmountable obstacle to the enforcement of Title VII.⁴⁸

⁴⁷ Even in that situation, it would not necessarily follow that all of the confidential information requested by the EEOC in this case should be disclosed. Instead, it might be appropriate to disclose only information about the specific complainant and even then to limit the disclosures to internal peer reviews. If that information reveals a need to go further, then perhaps the court would permit access to outside peer reviews of the complainant. In this way, the court would require disclosure of peer review concerning other academics only when all other available evidence indicates a need to review those files in order properly to resolve the complainant's case. Accordingly, it would be the rare case where confidential peer review materials concerning innocent third-party members of the faculty would be disclosed to the EEOC.

⁴⁸ The issue of redaction (the process of removing names and identifying characteristics of the peer reviewer) should properly arise in the context of deciding how much information should be revealed in light of the EEOC's particularized showing. As the Seventh Circuit made clear in *Notre Dame*, "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available [to the EEOC]." 715 F.2d at 337 n.4. The availability of redaction plainly does not obviate the need for a qualified privilege because the use of redacted files is not adequate to protect the legitimate interests of either the EEOC or the subpoenaed academic institution in every case. For example, certain writers can be identified easily by their writing style or other distinctive characteristics even after redaction. Others might be identified simply through the process of elimination, particularly at institutions where the faculty or reviewing committee is quite small or in situations where the number of persons within the academic specialty is limited. Moreover, the quality of redaction will vary, depending upon the skill and resources of the editor. The mere deletion of names will not always guarantee that the author cannot be identified. If, on the other hand, the editor chooses to delete every possible identifying

Indeed, the best available evidence shows that a qualified privilege imposes no undue burden on the EEOC. Like several other courts, the United States Court of Appeals for the Seventh Circuit has recognized a qualified privilege for confidential peer review files requested by the EEOC for at least six years; yet, there is nothing to indicate that the EEOC has been unable effectively to combat discrimination in higher education in Wisconsin, Indiana and Illinois.⁴⁹ Indeed, if there had been any enforcement problems, it is inconceivable that the EEOC would have opposed granting the petition in this case. It is settled policy of the federal government to acquiesce in the granting of certiorari in cases where ambiguity or conflict in the law has impaired an agency's enforcement responsibilities. The opposition of the EEOC to the petition filed in this case is the clearest evidence that the EEOC believes that it can fulfill its enforcement responsibilities fully even if the University's confidential tenure files are accorded a qualified immunity (as they are in the Seventh Circuit). In any event, it cannot be doubted that an absolute rule requiring disclosure of confidential documents without any specific showing why there is likely to be useful evidence in these files is not a narrowly tailored rule.

* * *

characteristic, what remains may well be so abbreviated that it is no longer informative. In applying a qualified privilege, courts will be able to analyze the particular risks involved in each case and craft disclosure (which should include redaction) in a manner that properly balances the interests of the parties.

⁴⁹ The lower courts which have protected confidential academic peer review material have referred to it both as a "qualified privilege" and as a "balancing test." Nevertheless, the fundamental mode of analysis is the same. See *Gray*, 692 F.2d at 904-905; Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 Wash. U.L.Q. 445, 462 n.98 (1987) (the "qualified privilege" is "functionally similar" to cases decided under the "rubric of a 'balancing approach'").

The fundamental flaw with the rule adopted by the Third Circuit is that it affords no protection to the University's interest in academic freedom and confidentiality, no matter what the circumstances. Under the Third Circuit rule, maximum disclosure always is mandated, regardless of necessity and regardless of harm. Because such disclosure of confidential peer review documents results in a substantial and unjustified infringement of the First Amendment protected academic freedom rights of universities and university professors, the adoption of a rule with the broadest—not the most narrowly tailored—impact on First Amendment rights plainly is unconstitutional. *Bellotti*, 435 U.S. at 794; *Shelton*, 364 U.S. at 487-490.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

SHELLEY Z. GREEN
NEIL J. HAMBURG
Office of the General Counsel
University of Pennsylvania
110 College Hall
Philadelphia PA 19104
(215) 898-7660

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
LOREEN M. MARCIL
JULI E. FARRIS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner

June 23, 1989

* Counsel of Record

RESPONDENT'S

BRIEF

(16)
No. 89-493

FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNIVERSITY OF PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

HARRY F. TEPKER, JR.
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

59pp

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 requires enforcement of an EEOC subpoena seeking tenure review materials relevant to a sworn charge that a university has intentionally discriminated against a candidate for tenure on the basis of race, sex, or national origin and, if so, whether enforcement of the subpoena violates the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	5
Argument:	
I. The Commission must have access to tenure review materials in order to perform its statutory mandate with respect to claims of discrimination in higher education	8
II. Title VII cannot properly be construed to permit a court to balance the Commission's need for information relevant to a sworn charge of unlawful discrimination against an employer's asserted interest in confidentiality	20
A. The language and structure of the statute foreclose any qualified privilege for tenure review materials	20
B. The legislative history confirms that Title VII remedies apply evenhandedly to institutions of higher education no less than to other employers	23
C. The principle that statutes should be interpreted to avoid serious constitutional issues does not support petitioner's claim	24
III. Title VII's subpoena enforcement provisions are constitutional as applied to tenure review materials	25
A. Enforcement of the Act's substantive prohibition on invidious discrimination involves no infringement on academic freedom	26
B. The Commission's subpoenas do not burden the freedom of universities to select the members of their faculties on academic grounds	29

IV

CONTENTS—Continued:

Page

C. There is a substantial relation between a request for information relevant to a sworn charge of discrimination and the compelling national interest in the elimination of discrimination from institutions of higher education	36
D. Petitioner's qualified privilege would seriously hamper and delay enforcement of Title VII ...	42
IV. There is no common law privilege protecting tenure review materials relevant to an EEOC investigation .	44
Conclusion	49

TABLE OF AUTHORITIES

Cases:

<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974) ...	36
<i>Barenblatt v. United States</i> , 360 U.S. 109 (1959)	26, 29, 38
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960)	30, 31, 36, 39
<i>Board of Directors of Rotary International v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987)	28
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982)	26
<i>Board of Trustees of Leland Stanford Junior University v. Superior Court</i> , 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981)	48
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	passim
<i>Brown v. Socialist Workers '74 Campaign Committee</i> , 459 U.S. 87 (1982)	25, 30, 33, 36
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	30, 36
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	24
<i>Clark v. United States</i> , 289 U.S. 1 (1933)	47
<i>Cockrell v. Middlebury College</i> , 148 Vt. 557, 536 A.2d 547 (1987)	48
<i>Commodity Futures Trading Comm'n v. Schor</i> , 478 U.S. 833 (1986)	24
<i>Cooper v. Ross</i> , 472 F. Supp. 802 (E.D. Ark. 1979)	26
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	24
<i>DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council</i> , 485 U.S. 568 (1988)	24

V

Cases—Continued:

Page

<i>Dinnan, In re</i> , 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982)	33
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 211 (1979)	47
<i>EEOC v. A.E. Staley Mfg. Co.</i> , 711 F.2d 780 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984)	42-43
<i>EEOC v. Associated Dry Goods Corp.</i> , 449 U.S. 590 (1981)	14, 15, 18, 22, 33
<i>EEOC v. Bay Shipbuilding Corp.</i> , 668 F.2d 304 (7th Cir. 1981)	44
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	4, 5, 17
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	14-15, 19, 23, 37, 42, 43, 45
<i>EEOC v. Tempel Steel Co.</i> , 814 F.2d 482 (7th Cir. 1987) ..	43
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	40, 42, 43, 45
<i>EEOC, In re</i> , 709 F.2d 392 (5th Cir. 1983)	44
<i>General Telephone Co. v. EEOC</i> , 446 U.S. 318 (1980) ...	14
<i>Gibson v. Florida Legislative Investigation Committee</i> , 372 U.S. 539 (1963)	30, 36
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	40, 45
<i>Gutzwiler v. Fenik</i> , 860 F.2d 1317 (6th Cir. 1988)	17
<i>Hafermehl v. University of Washington</i> , 29 Wash. App. 366, 628 P.2d 846 (1981)	47
<i>Healy v. James</i> , 408 U.S. 169 (1972)	26
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	31, 32, 34, 41
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)	10, 28
<i>International Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961)	24
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977)	24
<i>Jackson v. Harvard University</i> , 111 F.R.D. 472 (D. Mass. 1986)	17
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977)	40
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	26
<i>Kunda v. Muhlenberg College</i> , 621 F.2d 532 (3d Cir. 1980)	27

VI

Cases—Continued:

Page

<i>Konigsberg v. State Bar</i> , 366 U.S. 36 (1961)	29-30
<i>Lieberman v. Gant</i> , 630 F.2d 60 (2d Cir. 1980)	27
<i>Lynn v. Regents of the University of California</i> , 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982)	40
<i>McCulloch v. Sociedad Nacional de Marineros de Honduras</i> , 372 U.S. 10 (1963)	24
<i>McKillop v. Regents of the University of California</i> , 386 F. Supp. 1270 (N.D. Cal. 1975)	48
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958)	30, 33
<i>Namenwirth v. Board of Regents</i> , 769 F.2d 1235 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986)	17
<i>New York State Club Ass'n v. City of New York</i> , 108 S. Ct. 2225 (1988)	28
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	24
<i>NLRB v. Martins Ferry Hospital Ass'n</i> , 649 F.2d 445 (6th Cir.), cert. denied, 454 U.S. 1083 (1981)	23
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975)	46-47
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973)	28
<i>Occidental Life Ins. Co. v. EEOC</i> , 432 U.S. 355 (1977) ...	14, 15
<i>Orbovich v. Macalester College</i> , 119 F.R.D. 411 (D. Minn. 1988)	17
<i>Paul v. Leland Stanford University</i> , 46 Fair Empl. Prac. Cas. (BNA) 1350 (N.D. Cal. 1986)	32
<i>Pittsburgh Plate Glass Co. v. United States</i> , 360 U.S. 395 (1959)	42
<i>Price Waterhouse v. Hopkins</i> , 109 S. Ct. 1775 (1989)	15, 17, 18, 26, 27, 30
<i>Public Citizen v. Department of Justice</i> , 109 S. Ct. 2558 (1989)	24
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	26, 29
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	28
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	28
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	30, 33, 39
<i>St. Martin Lutheran Church v. South Dakota</i> , 451 U.S. 772 (1981)	24
<i>Stebbins v. Insurance Co. of North America</i> , No. 82-1915 (D.D.C. Jan. 27, 1983)	34

VII

Cases—Continued:

Page

<i>Sweeney v. Board of Trustees of Keene State College</i> , 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980)	17
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	25, 26, 39
<i>Thornburgh v. American College of Obstreticians & Gynecologists</i> , 476 U.S. 747 (1986)	30, 33
<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	46
<i>United States v. Euge</i> , 444 U.S. 707 (1980)	23, 44
<i>United States v. Gillock</i> , 445 U.S. 360 (1980)	47
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950) ...	22-23
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	42, 46
<i>University of Alaska v. Geistauts</i> , 666 P.2d 424 (Alaska 1983)	47
<i>Upjohn v. United States</i> , 449 U.S. 383 (1981)	23
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977)	16
<i>Zahorik v. Cornell University</i> , 729 F.2d 85 (2d Cir. 1984)	17, 27
<i>Zautinsky v. University of California</i> , 96 F.R.D. 622 (N.D. Cal. 1983), aff'd, 782 F.2d 1055 (9th Cir. 1985) ..	40

Constitution, statutes, regulations and rules:

U.S. Const. Amend. I	7, 24, 25, 26, 30, 33, 38, 39, 41
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 42 U.S.C. 2000e et seq.:	
§ 702, 42 U.S.C. 2000e-1 (78 Stat. 255)	10, 11
§ 703(a), 42 U.S.C. 2000e-2(a)	5, 10
§ 706(b), 42 U.S.C. 2000e-5(b)	2, 14
§ 706(f)(1), 42 U.S.C. 2000e-5(f)(1)	15, 18
§ 709(a), 42 U.S.C. 2000e-8(a)	2, 6, 15, 20, 22, 33
§ 709(e), 42 U.S.C. 2000e-8(e)	21
§ 710, 42 U.S.C. 2000e-9	2, 15, 20
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-104	10

VIII

Constitution, statutes, regulations and rules — Continued: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 11, 29 U.S.C. 161	2, 7, 15, 21
§ 11(1), 29 U.S.C. 161(1)	21, 22, 37
§ 11(2), 29 U.S.C. 161(2)	21

29 C.F.R.:

Section 1601.12	14, 37
Section 1601.15(b)	14
Section 1601.16(b)	37
Section 1601.22	34
Section 1601.28	15

Fed. R. Crim. P. 6(e)	47
-----------------------------	----

Fed. R. Evid. 501	44, 47
-------------------------	--------

Miscellaneous:

AAUP, <i>On Processing Complaints of Discrimination on the Basis of Sex</i> (1978), reprinted in <i>AAUP Policy Documents & Reports</i> (1984)	28
--	----

G. Bednash, <i>The Relationship Between Access and Selectivity in Tenure Review Outcomes</i> (1989)	31, 32
---	--------

Bergman, <i>Peer Evaluations of University Faculty</i> , 14 C. Student J. 1 (Fall 1980)	9
---	---

C. Byse & L. Joughin, <i>Tenure in American Higher Education: Plans, Practices and the Law</i> (1957)	8
---	---

R. Chait & A. Ford, <i>Beyond Traditional Tenure</i> (1982) ...	9, 10
---	-------

118 Cong. Rec. (1972):

p. 311	12
p. 591	13
p. 864	12
p. 946	12
pp. 1992-1993	13
p. 1993	12
p. 1995	13
p. 2266	12
p. 4919	12-13

1 Equal Employment Opportunity Commission Compliance Manual (1982)	34
--	----

IX

Miscellaneous — Continued: Page

<i>Faculty Tenure: A Report & Recommendations by the Commission on Academic Tenure in Higher Education</i> (1973)	8, 10
---	-------

Finkin, <i>On "Institutional" Academic Freedom</i> , 61 Tex. L. Rev. 817 (1983)	27
---	----

Gray, <i>Academic Freedom and Nondiscrimination: Enemies or Allies?</i> , 66 Tex. L. Rev. 1591 (1988)	28
---	----

H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971)	11, 37
--	--------

R. Hofstadter & W. Metzger, <i>The Development of Academic Freedom in the United States</i> (1955)	27
--	----

M. Larkin, <i>Federal Testimonial Privileges</i> (1988)	47
---	----

Letter from Dr. Morris Hamburg to Dean Russell Palmer (Sept. 26, 1985)	3, 40
--	-------

L. Lewis, <i>Scaling the Ivory Tower: Merit and Its Limits in Academic Careers</i> (1975)	9
---	---

Metzger, <i>Profession and Constitution: Two Definitions of Academic Freedom of America</i> , 66 Tex. L. Rev. 1265 (1988)	27
---	----

R. Miller, <i>Evaluating Faculty for Promotion and Tenure</i> (1987)	9
--	---

Proposed F. R. Evid. 509, 56 F.R.D. 251 (1972)	47
--	----

S. Rep. No. 415, 92d Cong., 1st Sess. (1971)	11, 13, 37
--	------------

Staff of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., <i>Legislative History of the Equal Employment Opportunity Act of 1972</i> (Comm. Print 1972)	11
--	----

8 J. Wigmore, <i>Evidence</i> (McNaughton rev. 1961)	46
--	----

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-493

UNIVERSITY OF PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 850 F.2d 969. The orders of the district court (Pet. App. A34-A35) are unreported. The determination of the Equal Employment Opportunity Commission denying petitioner's application for modification of the Commission's subpoena (Pet. App. A29-A33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1988. A petition for rehearing was denied on August 11, 1988 (Pet. App. A28). The petition for a writ of certiorari was filed on September 19, 1988, and was granted on December 12, 1988, limited to the second question stated in the petition. On April 7, 1989, the Court amended its prior order and granted review limited to the first question stated in the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 706(b), 709(a), and 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), 2000e-8(a), 2000e-9, and of Section 11 of the National Labor Relations Act, 29 U.S.C. 161, which is incorporated by reference in 42 U.S.C. 2000e-9, are reproduced in an appendix to respondent's brief in opposition (at 1a-3a).

STATEMENT

1. After being recommended for tenure by a majority of the members of her department, Rosalie Tung, an Associate Professor in the Management Department of the Wharton School, was denied tenure by a vote of petitioner's Personnel Committee. In August 1985, she filed a sworn charge of discrimination with the Equal Employment Opportunity Commission. J.A. 23-26. As subsequently amended, the charge alleged that Tung had been the victim of discrimination on the basis of race, sex, and national origin. J.A. 27-28.

In her charge, Tung stated that her Department Chairman had sexually harassed her and, after she insisted that their relationship remain professional, had submitted a negative letter to the Personnel Committee. J.A. 28-29. The charge also alleged that Tung's qualifications were equal to or better than those of five named male faculty members who had received more favorable treatment. J.A. 29. Tung alleged that she had been given no reason for the decision to deny her tenure, but had discovered that the Personnel Committee had attempted to justify its decision "on the ground that the Wharton School is not interested in China-related research." *Ibid.* This explanation, her charge alleged, was a pretext for discrimination—"simply their way of saying they do not want a Chinese-American, Oriental, woman in their school." *Ibid.*

The EEOC began an investigation into Tung's charge, and requested relevant information from petitioner. When petitioner refused to provide some of that information, the Commission's District Director issued a subpoena seeking, *inter alia*, Tung's tenure file and the tenure files of the five faculty members iden-

tified in Tung's charge. J.A. 21-22. Petitioner refused to produce some of the documents responsive to these specifications. It applied to the Commission for modification of the subpoena to exclude what it termed "confidential peer review information": specifically, (i) confidential letters written by Tung's evaluators; (ii) the Department Chairman's letter of evaluation; (iii) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations of the Management Department and certain members of that Department on Tung's application for tenure; and (iv) comparable portions of the tenure review files of the male faculty members referred to in the charge. C.A. J.A. 5, 8-9. Petitioner urged the Commission to "adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process" and to resort to "all feasible methods to minimize the intrusive effects of its investigations (i.e., exhaustion of other discovery methods, redaction, etc.)." C.A. J.A. 9.

2. The Commission denied petitioner's application. Pet. App. A29-A33. The Commission concluded that the documents were "needed in order to make a determination on the allegations of employment discrimination made by Ms. Tung in her charge"—i.e., "whether Ms. Tung was treated differently than those who received tenure." *Id.* at A30. The Commission also found that "[t]here has not been enough data supplied in order for the Commission to determine whether there [was] reasonable cause" to believe that Tung's charge of discrimination was true. *Id.* at A31.

The Commission rejected the contention that a letter setting forth the Personnel Committee's reasons for denying Tung tenure, which was prepared after her charge was filed, was sufficient for disposition of the charge. See C.A. J.A. 7.¹ "The Commission would fall short of its obligation" to investigate charges

¹ Letter from Dr. Morris Hamburg to Dean Russell Palmer (Sept. 26, 1985) (hereinafter Hamburg Letter). This letter was not in the record, but was quoted in petitioner's brief (at 4 n.2). We have lodged a copy with the Clerk.

of discrimination, it stated, "if it stopped its investigation once [an employer] has * * *, provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination." Pet. App. A32.

Finally, the Commission rejected petitioner's proposed balancing test, explaining that "such an approach in the instant case * * * would impair the Commission's ability to fully investigate this charge of discrimination." Pet. App. A33. The Commission noted that in *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (1985), cert. denied, 476 U.S. 1163 (1986), the Third Circuit had found "nothing in the legislative background of Title VII, nor any other policy reasons, to support [the] contention that tenure decisions should be treated any differently from any other employment decisions, notwithstanding principles of academic freedom." Pet. App. A31. The Commission advised petitioner that it would initiate subpoena enforcement proceedings in the district court unless petitioner complied with the subpoena within 20 days.²

3. Petitioner continued to withhold the responsive tenure review materials, and the Commission applied to the United States District Court for the Eastern District of Pennsylvania for enforcement of its subpoena. J.A. 15-30. That court entered a brief order enforcing the Commission's subpoena. Pet. App. A35.

4. Relying on its decision in *Franklin & Marshall*, the court of appeals affirmed. Pet. App. A1-A27. The court explained that in *Franklin & Marshall* it had declined to adopt a qualified privilege or a balancing approach to Commission subpoenas, because "Congress delivered a 'clear mandate' subjecting academic institutions to the express requirements of Title VII." *Id.* at A10. The court also incorporated *Franklin & Marshall's* discussion of the relevance of tenure review materials to claims of discrimination and the importance of protecting the Commis-

² Three days before the 20-day grace period expired, petitioner brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and an order quashing the EEOC's subpoena. J.A. 4-14.

sion's unencumbered access to such materials (*id.* at A10-A11 (quoting 775 F.2d at 116)):

[A]n alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. . . . [T]he peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.

The court of appeals remanded for consideration of whether petitioner should be allowed to delete names and other identifying information from the disputed records before producing them. Pet. App. A26-A27. With that exception, the court affirmed the district court's order enforcing the EEOC's subpoena. *Id.* at A27.³

SUMMARY OF ARGUMENT

I. Tenure is among the "terms, conditions, or privileges of employment" (42 U.S.C. 2000e-2(a)) that cannot be withheld on the basis of race, sex, or national origin. Indeed, rigorous enforcement of Title VII in this context is of particular importance. Discriminatory tenure decisions severely affect the careers of the faculty members involved, and their effects are long-term. In 1972, acting on evidence that discrimination was widespread in educational institutions at all levels, Congress amended Title VII to eliminate that Act's exemption for educa-

³ The court of appeals also affirmed the district court's decision not to dismiss or stay this action in deference to petitioner's anticipatory District of Columbia suit. Pet. App. A14-A20. That aspect of the decision is not at issue before this Court under the Court's limited grant of certiorari.

tional institutions. The legislative history reflects Congress's concern with discriminatory obstacles to attaining higher academic ranks on university faculties and with the importance of subjecting colleges and universities to the same standards applicable to other employers.

With the passage of that legislation, Congress exposed colleges and universities to the same "integrated, multistep enforcement procedure" that applies to other employers. Under that procedure, the Commission is responsible for investigating charges of discrimination, attempting conciliation when it finds reasonable cause to believe that a charge is true, and bringing suit if conciliation fails. To enable the Commission to discharge its responsibilities, Section 709(a) of the Act, 42 U.S.C. 2000e-8(a), gives the Commission a right of access to "any evidence of any person being investigated" that is "relevant to the charge under investigation." That Act also authorizes the Commission to issue and seek enforcement of subpoenas for such evidence.

Unencumbered access to tenure review materials is essential to effective enforcement of Title VII with respect to tenure determinations. To assess whether there is reasonable cause supporting a charge, the Commission must have access to all information on which decisionmakers have relied and materials reflecting deliberations on the applicant's qualifications at various stages of the tenure review process. These materials permit the EEOC to consider, among other things, whether an unfavorable tenure decision has been influenced by stereotypes, whether the institution has departed from its own standards, whether the charging party was treated differently than other comparable candidates, and whether the stated grounds for a decision are pretextual. By their own account, petitioner and its amici rely heavily on peer reviews in making their employment decision; petitioner's proposed peer review privilege would extend to these and other documents reflecting the decisionmaking process that leads to a denial of tenure. To discharge its responsibilities under the Act, the Commission must have the same access to those documents as to comparable materials generated by other employers.

II. Title VII cannot properly be construed to embody a qualified privilege for tenure review materials. Section 709(a) of that Act, 42 U.S.C. 2000e-8(a), gives the Commission a right of access to "any evidence of any person being investigated * * * that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation." The subpoena enforcement provisions that Title VII incorporates from Section 11 of the National Labor Relations Act, 29 U.S.C. 161, can only be read to provide legal process to enforce that right. Moreover, the legislative history of the statute shows that when Congress eliminated the exemption for educational institutions in 1972, it made clear its intention to extend the Act's remedies to colleges and universities as they apply to other employers. The language and legislative history of the statute leave no room for application of the principle that statutes should be construed, if fairly possible, to avoid serious constitutional issues.

III. There is also no merit to petitioner's argument that the First Amendment requires recognition of a qualified privilege for tenure review materials. Title VII does not interfere with the freedom of a university to determine on academic grounds who may teach. Academic freedom does not protect universities from complying with subpoenas for information relevant to a charge that they have discriminated against a candidate for tenure. Judged by reference to this Court's cases, compliance with such a subpoena does not involve the kind of significant encroachment upon important and traditional aspects of individual freedom for which the First Amendment might require a showing of special justification.

Even if a subpoena for tenure review materials interfered with protected activity, there would be a constitutionally sufficient justification for requiring compliance. The elimination of invidious discrimination from employment is a compelling national interest of the highest priority. There is a substantial relation between that goal and enforcement of subpoenas seeking evidence relevant to a sworn charge of discrimination. On the facts of this case, it is clear that the Commission's subpoena was issued for a proper purpose and that it seeks evidence relevant to Tung's charge of discrimination. The First Amendment re-

quires nothing more. Finally, recognition of a qualified privilege that made enforcement of the Commission's subpoenas contingent on a showing, "based on a variety of factors," that the Commission has a "specific reason for disclosure that 'outweighs' the university's interest in confidentiality" (Pet. Br. 45-46) would seriously hobble enforcement of Title VII in the context of tenure determinations.

IV. There is no common law privilege for tenure review materials. Petitioner's argument for such a privilege assumes, incorrectly, that this Court may reconsider the balance that Title VII strikes between the Commission's need for relevant evidence and petitioner's asserted interest in confidentiality. Even if petitioner's proposed privilege were not foreclosed by Title VII, it would not satisfy the standards that this Court has applied in determining the existence and scope of common law privileges. There is virtually no support in state or federal law for the proposed privilege. Moreover, the same considerations that foreclose recognition of a constitutional privilege for tenure review materials also weigh heavily against creation of a common law privilege.

ARGUMENT

I. THE COMMISSION MUST HAVE ACCESS TO TENURE REVIEW MATERIALS IN ORDER TO PERFORM ITS STATUTORY MANDATE WITH RESPECT TO CLAIMS OF DISCRIMINATION IN HIGHER EDUCATION

1. Academic tenure is "an arrangement under which faculty appointments in an institution of higher education are continued until retirement, subject to dismissal for adequate cause" or other exigent circumstances. *Faculty Tenure: A Report & Recommendations by the Commission on Academic Tenure in Higher Education* 256 (1973) (hereinafter *Faculty Tenure*). On every aspect of tenure, policies and practices vary widely among American colleges and universities.⁴ However, junior faculty

⁴ See, e.g., C. Byse & L. Joughin, *Tenure in American Higher Education: Plans, Practices and the Law* 9 (1957) ("plans and procedures [relating to tenure] indicate a bewildering assortment of criteria and procedures governing acquisition and termination of tenure"); *Faculty Tenure*, supra, at 2-3 ("On

members are typically employed under fixed-term contracts for probationary periods of up to seven years. R. Chait & A. Ford, *Beyond Traditional Tenure* 3 (1982). Usually around a year before the end of that period, the university determines whether to grant tenure. *Ibid.*

Tenure decisions involve consideration of a number of factors—including teaching, scholarship, service within the institution, and others. See R. Chait & A. Ford, supra, at 149-150. One source of information used in tenure determinations is "peer review"—a term that can encompass a variety of arrangements, including faculty committees, evaluations solicited from individuals outside the tenure candidate's institution, and evaluations provided by other faculty members in the candidate's department. See R. Miller, *Evaluating Faculty for Promotion and Tenure* 107-110 (1987). Peer review may address any of the factors that an institution considers relevant to tenure. See *ibid.*⁵ Usually, the decision whether to grant tenure is the end result of a procedure that involves deliberations by members of the candidate's department, faculty committees, the administration, and perhaps the board of trustees. R. Miller, supra, at 115. We understand that petitioner's procedures are consistent with these general practices.

Petitioner does not and could not contest the applicability of Title VII to its decision to deny Tung tenure. Tenure is un-

every aspect of tenure * * * the range of variations among the 2600 institutions of higher education (and sometimes even within institutions—from division to division or even department to department) is enormous.").

Though tenure is very widespread in institutions of higher education, it is not universal. See R. Chait & A. Ford, *Beyond Traditional Tenure* 13-66 (1982). In recent years, the benefits and costs of tenure have been the subject of some debate. *Faculty Tenure*, supra, at 13-20; R. Chait & A. Ford, supra, at 4-12.

⁵ Peer review is not universal. R. Miller, supra, at 110. In addition, some studies have questioned the objectivity of peer review. See, e.g., L. Lewis, *Scaling the Ivory Tower: Merit and Its Limits in Academic Careers* 51-76 (1975); Bergman, *Peer Evaluations of University Faculty*, 14 C. Student J. 1 (Fall 1980). It would be unwarranted to assume that peer review systems in institutions of higher education invariably conform to the ideal set out in briefs filed by petitioner and its amici.

doubtedly among the "terms, conditions, or privileges of employment" (42 U.S.C. 2000e-2(a)) that may not be withheld on the basis of an individual's race, color, religion, sex, or national origin. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Indeed, a university's decision whether to grant tenure is one of the most important employment decisions to which an individual faculty member is exposed. If tenure is granted, the faculty member can later be terminated only on very narrow grounds. But if tenure is denied, the "up or out" policies typically followed by universities require the faculty member to leave the institution at the end of his or her probationary term. R. Chait & A. Ford, *supra*, at 3-4. Those individuals who wish to continue pursuing an academic career must then seek employment with another institution and, often, serve another probationary term before again being considered for tenure. See *Faculty Tenure*, *supra*, at 5. For the individual, therefore, a university's tenure determination spells the difference between an offer of permanent employment and a notice of termination, with resulting uncertainty as to one's professional future.

Rigorous enforcement of Title VII with respect to tenure decisions is central to the goal of eliminating discrimination in institutions of higher education. When an applicant is denied tenure on discriminatory grounds, the effects of that decision persist for many years. The very permanence of a tenure determination (see Pet. Br. 19) is therefore a powerful reason to examine carefully any claim that it resulted from invidious discrimination.

2. Congress affirmed the importance of bringing Title VII to bear on tenure decisions when, in 1972, it extended the Act to educational institutions. When Title VII was originally enacted in 1964, it contained an exemption for "educational institution[s] with respect to the employment of individuals to perform work connected with the educational activities of such institution[s]." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 702, 78 Stat. 255. Eight years later, Congress eliminated that exemption in enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-104.

The legislative history indicates that this extension of Title VII was not inadvertent; to the contrary, Congress paid particular attention to invidious discrimination (*i.e.*, discrimination on the basis of race, sex, religion, or national origin) in institutions of higher education, and the legislation was enacted over objections that it would infringe on those institutions' academic judgments. The accompanying committee reports stressed the concern that invidious discrimination in educational institutions was widespread. S. Rep. No. 415, 92d Cong., 1st Sess. 11 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 19-20 (1971).⁶ Contrary to petitioner's suggestion (Pet. Br. 43), Congress's attention was not directed exclusively at "the millions of teachers, administrators, clerical employees and maintenance employees" who were covered by the exemption.⁷ The House Report focused specifically on discrimination in higher education and, indeed, on denial of access to higher ranking (*i.e.*, tenured) academic positions (H.R. No. Rep. 238, *supra*, at 19-20 (emphasis added)):

In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.

*When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In [one] study, * * * it was found*

⁶ These reports, the debates cited below, and the texts of the bills and amendments referred to are reprinted in a committee print: Staff of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972).

⁷ Indeed, the educational institution exemption encompassed only employees who performed work "connected with the educational activities of such institution." § 702, 78 Stat. 255.

that the primary factors determining the hiring of male faculty members were prestige and compatibility, but that women were generally considered to be outside of the prestige system altogether.

Senator Williams, the sponsor and floor manager of the bill in the Senate, stressed the same point on the floor. 118 Cong. Rec. 2266 (1972).

Also on the Senate floor, opponents of the legislation twice introduced amendments to preserve the educational institution exemption. See 118 Cong. Rec. 864, 4919 (1972) (Amendments 815 and 844). Although petitioner argues that "it is unlikely that any member of Congress gave any specific consideration to the effect of the [1972 Act] on the university tenure process" (Pet. Br. 43), proponents of those amendments repeatedly emphasized the asserted effect that removal of the exception for educational institutions would have on academic freedom and faculty hiring and promotions. One opponent referred specifically to tenure (*id.* at 1993 (remarks of Sen. Allen)):

Objective criticism, independent judgment, the search for truth unhampered by transient political interests—all of which are vital to academic freedom—could be altered and reshaped by the EEOC. Academic tenure—the very cornerstone of academic freedom—would be placed in serious jeopardy if Federal hiring and promotion practices are substituted for those of local school administrators.

This theme—that enforcement of Title VII against institutions of higher education would interfere with decisions to hire and promote faculty members—was emphasized on many occasions.⁸ Notwithstanding those concerns, the Senate defeated

⁸ See 118 Cong. Rec. 311 (1972) (remarks of Sen. Ervin) (EEOC would have power to "pass on qualifications of doctors of philosophy or professors of mathematics in all non-State colleges in the United States"); *id.* at 946 (remarks of Sen. Allen) ("Academic freedom which is so revered by liberal thought in this country, might very well be a thing of the past if this bill passes without this amendment and we would have the Equal Employment Opportunity Commission taking over the employment and promotion practices of colleges and schools throughout the country * * *"); *id.* at 4919 (remarks of

amendments offered to preserve the educational exemption by votes, respectively, of 55-25 and 70-15. *Id.* at 1995, 4919.

Repeatedly, proponents of the legislation emphasized the importance of eliminating any distinction between educational institutions and other employers. Their goal was to give professors and teachers not merely an "effective federal remedy" (Pet. Br. 43 n.44), but the *same* remedies already conferred on employees elsewhere.⁹ In fact, the Senate Committee Report concluded that "discrimination in educational institutions is particularly critical," since "[t]o permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination." S. Rep. No. 415, *supra*, at 12.

Sen. Ervin) ("Federal judges, and members of the EEOC are not competent to pass on the qualifications of people who teach such abstract subjects as anthropology and other subjects in institutions of higher learning.").

Plainly, these concerns were overstated. Nevertheless, it cannot be said that Congress was oblivious to issues of academic freedom or the desire of universities to avoid inquiry into tenure decisions when it eliminated the educational institution exemption.

⁹ See, e.g., S. Rep. No. 415, *supra*, at 12 ("The Committee believes that it is essential that these employees be given the same opportunity to redress their grievances as are available to other employees in other sectors of business."); 118 Cong. Rec. 591 (1972) (remarks of Sen. Humphrey) ("I can find no reason why these institutions should enjoy a special immunity in their employment practices. There is nothing in Title VII to suggest that employment in educational institutions is any different from employment anywhere else. If anything, it is our schools which most affect the future development of this country, and should * * * be leaders in equal opportunity in all respects."); *id.* at 1992-1993 (remarks of Sen. Williams) ("[T]hese 4 million [employees of educational institutions] are no different from other employees in the Nation and deserve to be accorded the same protection. To continue the existing exemption for these employees would not only continue to work an injustice against this vital segment of our Nation's work force, but would also establish a class of employers who could pursue employment policies which are otherwise prohibited by law. * * * We must correct this important defect of Title VII immediately, and provide employees of educational institutions the same protections that we accord the rest of the Nation's workforce.").

3. The effect of the elimination of Title VII's exemption for educational institutions was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions. As this Court has noted, Title VII creates "an integrated, multistep enforcement procedure" that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (citation omitted).¹⁰ The efficacy of each step of that procedure depends directly on the Commission's unencumbered access to information relevant to alleged discrimination.

The Commission's enforcement responsibilities are triggered by the filing of a specific, sworn charge of discrimination.¹¹ The Act obligates the Commission to investigate charges of discrimination to determine whether "there is reasonable cause to believe that the charge is true." Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). If it finds no reasonable cause, the Commission is obligated to dismiss the charge. *Ibid.* If it does find reasonable cause, the Commission "endeavor[s] to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* This requirement reflects Congress's wish "that violations of the statute could be remedied without resort to the courts." *EEOC*

¹⁰ This Court has considered various interrelated elements of this scheme on a number of occasions. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981); *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

¹¹ Under the Commission's regulations, a charge must set forth, inter alia, "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. 1601.12. The Commission's regulations allow it to insist on additional detail when appropriate to facilitate an investigation. The Commission may require the charging party to submit a further statement including (29 C.F.R. 1601.15(b)):

- (1) A statement of each specific harm that the person has suffered and the date on which each harm occurred;
- (2) For each harm, a statement specifying the act, policy, or practice which is alleged to be unlawful;
- (3) For each act, policy or practice alleged to have harmed the person claiming to be aggrieved a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy or practice is discriminatory.

v. Shell Oil Co., 466 U.S. at 78; see *id.* at 90 (O'Connor, J., concurring in part and dissenting in part). See also *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977). If attempts at voluntary resolution fail, the Commission may bring an action against the employer in accordance with Section 706(f)(1) of the Act, 42 U.S.C. 2000e-5(f)(1).¹²

To enable the Commission to make informed decisions at each stage of the enforcement process, Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a), confers a broad right of access to relevant evidence:

[T]he Commission or its designated representative shall * * * have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated * * * that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation.

If employers refuse to provide information voluntarily, the Act authorizes the Commission to issue subpoenas and to seek orders enforcing them. Section 710 of Title VII, 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161).

When it is alleged that a university has discriminated against an individual in a tenure determination, the Commission seeks access to tenure review materials to perform each of its statutory responsibilities:

First, in determining whether there is "reasonable cause" to believe that an employer has intentionally discriminated against an employee, the Commission must consider whether race, sex or another impermissible consideration was a "motivating" or "substantial" factor in the decision. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1787 (1989) (plurality opinion); *id.* at 1795 (White, J., concurring); *id.* at 1798 (O'Connor, J., concurring). "Determining whether invidious discriminatory purpose

¹² Similarly, the charging party may bring an action after it obtains a "right-to-sue letter" from the Commission. The charging party has a right to such a letter if the EEOC has not concluded its investigation within 180 days of the filing of the charge. 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.28. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595-596 n.6 (1981).

was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

The materials to which petitioner's proposed qualified tenure review privilege would apply are often among the most important "circumstantial and direct evidence" to which the Commission can refer. The briefs filed by petitioner and its amici emphasize that universities rely very heavily on evaluations of a tenure candidate by his or her peers. See, e.g., Pet. Br. 20. Moreover, tenure review materials can include documents reflecting the grounds on which university decisionmakers have denied tenure. In this case, for instance, petitioner has withheld not only evaluations by Tung's reviewers, but also other documents reflecting the progress of Tung's application at various stages of the decisionmaking process. Those documents include at least the letter from the Chairman of Tung's Department to the Personnel Committee and records of the deliberations of the Management Department on her merit. See p. 3, *supra*. Petitioner maintains that it should not have to produce any "documents reflecting the internal deliberations of faculty committees considering applications for tenure" (C.A. J.A. 4).

The Commission cannot discharge its responsibility to determine the existence of "reasonable cause" without unencumbered access to materials on which decisionmakers have relied and records reflecting the decisionmaking process itself. As amicus Harvard University recognizes, when tenure is denied on the basis of alleged deficiencies in the candidate's scholarship, "the EEOC . . . will have a legitimate need to discover the substance of the tenure file on which the decision was based, including the substance of evaluations made by peer reviewers both inside and outside the university." Harvard Br. 32. The Commission must examine carefully whether those materials reflect, among other things, differences between the treatment afforded the charging party and other applicants,¹³ reliance by

¹³ "Comparisons may be more difficult in the case of professional and academic employment decisions, but they may be essential to a determination

decisionmakers on evaluations reflecting sexual or racial stereotypes,¹⁴ and departures from established procedures.¹⁵ The Commission must also consider the extent to which available evidence supports the nondiscriminatory justifications that the university offers for its decision.

Tenure review material may be relevant for any of these purposes. As the Third Circuit observed in *Franklin & Marshall*, 775 F.2d at 116:

There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the appellant seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears.[¹⁶]

In conducting its investigations, the Commission cannot be limited to "readily available evidence" (see Pet. Br. 26). It is a rare employer—universities are no exception—that concedes that any available evidence is suggestive of discrimination.¹⁷

of discrimination; and where they are, and where the evidence is available, they must be made." *Namenwirth v. Board of Regents*, 769 F.2d 1235, 1241 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986). See *Jackson v. Harvard University*, 111 F.R.D. 472, 475-476 (D. Mass. 1986); *Orbovich v. Macalester College*, 119 F.R.D. 411, 415-416 (D. Minn. 1988).

¹⁴ *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1791 (plurality opinion); *id.* at 1802 (O'Connor, J., concurring). See *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106, 112-113 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

¹⁵ *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984).

¹⁶ Many of the reported cases appear to discuss tenure review materials in the course of determining claims of discrimination. E.g., *Gutzwiller v. Fenik*, 860 F.2d 1317, 1322-1323, 1326-1327 (6th Cir. 1988); *Zahorik v. Cornell University*, 729 F.2d at 89-91 (2d Cir. 1984).

¹⁷ In this case, for instance, petitioner suggests that the Commission is engaged in a "casual inquiry" unsupported by "even one shred of evidence" of discrimination (Pet. Br. 31 n.31). Plainly, however, a sworn charge of sexual harassment and resulting retaliation by the complainant's Department Chairman cannot be denigrated as meaningless.

When Congress provided the Commission with a right of access to "any evidence" relevant to a charge of discrimination, it empowered the EEOC to look behind the claims that employers might advance to justify their decisions. In cases involving denials of tenure, just as in those involving denial of a partnership, *Price Waterhouse v. Hopkins*, *supra*, it is necessary to examine the information on which decisionmakers relied and contemporaneous records reflecting the basis for their decisions. In this case, the Commission cannot assess whether Tung was treated differently than similarly situated males without comparing their files to hers; cannot determine whether petitioner's statement of reasons is bona fide without examining the records to which it refers; and cannot evaluate her claim that her Department Chairman retaliated against her without reviewing his letter in the context of other assessments of her merit.

Second, the Commission cannot discharge its obligation to conciliate charges of discrimination without access to materials reflecting the reasons for an unfavorable tenure decision. The Commission cannot facilitate a settlement between a candidate for tenure and a university unless it can discuss the strengths and weaknesses of their respective positions in terms of the evidence that each would have in the event of litigation. In this case, for instance, petitioner has relied heavily on peer review materials in justifying its decision. See p. 16, *supra*. It is unlikely that the Commission could persuasively urge a settlement without being able to address the documents that petitioner has advanced as support for its decision. Cf. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. at 601 (noting that disclosure of evidence to the charging party "enhances the Commission's ability to carry out its statutory responsibility to resolve charges through informal conciliation and negotiation").

Finally, unencumbered access to tenure review materials is necessary so that, if the Commission's conciliation efforts fail, it can effectively proceed with its responsibility to litigate claims of discrimination that it finds to be supported by reasonable cause. See 42 U.S.C. 2000e-5(f)(1). The Commission has limited resources. Thus, it has a strong interest in assuring that it does

not initiate an action until it has completed a thorough investigation.

4. This Court has acknowledged that the Commission has discretion to determine what information is necessary to enable it to discharge its responsibilities under Title VII. When a court is asked to enforce a Commission subpoena, its responsibility is limited to "satisfy[ing] itself that the charge is valid and that the material requested is 'relevant' to the charge . . . and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *EEOC v. Shell Oil Co.*, 466 U.S. at 72 n.26. If a subpoena meets these standards, the court must enforce it. Because unencumbered access to relevant information is essential to the effectiveness of the Commission's investigations, this Court and other courts have refused to condition enforcement of EEOC subpoenas on threshold showings going to the merits of a charge. In *Shell Oil*, for instance, the Court observed that "any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error." *Ibid*. Requiring such a showing would be "plainly inconsistent with the structure of [Title VII's] enforcement procedure," since the purpose of an investigation is "to determine whether there is reason to believe" that a charging party's allegations are true. *EEOC v. Shell Oil Co.*, 466 U.S. at 71.

In short, the Commission's statutory right of access to "any evidence" relevant to a charge, backed by reliable procedures for enforcing its subpoenas, is a critical element of Title VII's enforcement scheme. Rather than providing for enforcement of Title VII solely through private actions, Congress authorized the Commission to conduct investigations into charges of discrimination, to conciliate cases in which there is reasonable cause to believe that discrimination occurred, and to bring actions when conciliation proves impossible. Unless tenure determinations are to be treated differently than other employment decisions, a result that would be contrary to Congress's intention in extending the Act to institutions of higher education in 1972, the Commission must have the same unencumbered access

to tenure review materials as it does to any other relevant evidence. As we demonstrate below, there is no basis in the statute, the Constitution, or the common law for any qualification on the Commission's authority to issue and enforce subpoenas seeking tenure review materials relevant to a claim of discrimination.

II. TITLE VII CANNOT PROPERLY BE CONSTRUED TO PERMIT A COURT TO BALANCE THE COMMISSION'S NEED FOR INFORMATION RELEVANT TO A SWORN CHARGE OF UNLAWFUL DISCRIMINATION AGAINST AN EMPLOYER'S ASSERTED INTEREST IN CONFIDENTIALITY

Although petitioner does not argue that the Commission failed to make the showings required by *Shell Oil* for enforcement of its subpoena (see Pet. App. A24), it nevertheless contends that the Act permits a court to withhold enforcement if it determines that petitioner's asserted interest in confidentiality outweighs the Commission's need for responsive evidence. Pet. Br. 37-44. This argument fails. The language and structure of the Act, supported by its legislative history, permit no such exception for tenure review materials. Nor can an exception be based upon the principle that statutes should be interpreted to avoid serious constitutional questions.

A. The Language and Structure of the Statute Foreclose Any Qualified Privilege for Tenure Review Materials

1. As we have noted, Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a), unambiguously provides the Commission with a statutory right of "access to . . . any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation." The terms "any evidence" and "any person being investigated" are clear and all-encompassing. They permit no distinction between tenure review materials and other evidence, or between universities and any other type of employer.

To implement the Commission's right of access to relevant evidence, Section 710 of Title VII, 42 U.S.C. 2000e-9, incor-

porates procedures for issuing and enforcing subpoenas from Section 11 of the National Labor Relations Act, 29 U.S.C. 161. Under Section 11(1), the Board, and thus the Commission, may issue subpoenas requiring the attendance of witnesses or the production of evidence. The same Section allows a party served with such a subpoena to apply for revocation of the subpoena; the Board or the Commission, as the case may be, must grant that relief "if in its opinion the evidence . . . does not relate to any matter under investigation" or "if in its opinion such subpoena [sic] does not describe with sufficient particularity" the responsive evidence. Finally, Section 11(2), 29 U.S.C. 161(2), provides that if the employer refuses to obey the subpoena, a district court:

upon application . . . shall have jurisdiction to issue to such person an order requiring such person . . . to produce evidence if so ordered, or . . . to give testimony touching the matter under investigation or in question . . .

The structure of the Act compels the conclusion that this Section provides a tool—legal process—to enforce the Commission's statutory right of access.

Significantly, Title VII anticipates and addresses situations in which an employer may have an interest in the confidentiality of its records. The same Section that gives the Commission access to any evidence relevant to its investigations also makes it "unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding" under the Act. Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e). Any violation of this provision subjects the Commission's employees to criminal penalties. *Ibid.* This Section of the Act strikes the balance between the Commission's need for relevant information and any interest that an employer may have in maintaining its confidentiality, and thus plainly shows that Congress intended the Commission to have access to sensitive materials. The statute permits

the Commission access to the information, but, until a suit is filed, permits the Commission to disseminate it only to the extent necessary to discharge its statutory responsibilities. See *EEOC v. Associated Dry Goods Corp.*, *supra*. Congress having spoken, there is no occasion for the courts to draw a different balance by means of a judicially created privilege.

Petitioner argues, nevertheless, that Title VII leaves courts with discretion to provide additional protection for tenure review documents. Although petitioner recognizes that Title VII gives the Commission broad "power to seek access to all evidence that may be 'relevant to the charge under investigation'" (Pet. Br. 38), it nevertheless contends that Title VII's subpoena enforcement provisions do not give the Commission an unqualified right to *acquire* such evidence. See Pet. Br. 38-41.

That interpretation is untenable. First, the plain language of Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a), states that the Commission "shall * * * have access" to relevant evidence; this can only be read as giving the Commission a right to that evidence, not a mere "power to seek" it. Second, the structure of the Act compels the conclusion that the Commission's subpoena power—a familiar form of compulsory process—is a means of enforcing, not a limitation on, that right.¹⁸ The Commission obviously did not require subpoena power and a statutory right of access in order to be able to make a request for information which the recipient could agree or decline to provide as a matter of choice. Finally, by specifying the extent to which employers' interests in confidentiality are to be protected, Title VII forecloses any unwritten exceptions based upon such interests.

¹⁸ That is clearly the relationship between the right of access that the first sentence of Section 11(1) confers on the NLRB—a right to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question" (29 U.S.C. 161(1))—and the succeeding sentences of the Section.

The NLRA's use of the term "relates to," as opposed to Title VII's "relevant to," has no interpretive significance. On their face, these phrases are synonymous. Courts asked to enforce subpoenas issued under the NLRA have applied the same standard, derived from *United States v. Morton Salt Co.*,

Of course, a person cannot be ordered to produce documents when the order would violate his privilege against self-incrimination or another constitutional right. Similarly, statutes guaranteeing agencies access to relevant evidence have not been construed to override established and generally applicable privileges, such as the attorney-client privilege or the work product doctrine. See *Upjohn v. United States*, 449 U.S. 383, 398 (1981); *United States v. Euge*, 444 U.S. 707, 714 (1980). However, no such traditional privilege is implicated here, and Title VII itself creates no privilege for any category of evidence. Accordingly, the Commission's statutory grant of subpoena power is controlling here on its face—when it is construed, as it should be, in light of the "longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege * * *." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citations omitted).

B. The Legislative History Confirms That Title VII Remedies Apply Evenhandedly to Institutions of Higher Education No Less Than to Other Employers

The legislative history of the 1972 amendments to Title VII confirms that this straightforward reading of the statutory text correctly reflects Congress's intent. As we have recounted (pp. 11-13, *supra*), the proponents of the extension of Title VII to educational institutions were particularly concerned with discrimination in colleges and universities, including denial of access to the higher academic ranks. Twice, the Senate defeated efforts to preserve the exemption for educational institutions, rejecting claims that the exemption was necessary to protect universities' academic judgments from interference. Supporters of the legislation emphasized the importance of giving teachers and faculty members the same remedies as other employees. There is no basis for believing that the Congress that acted on

338 U.S. 632, 653 (1950), that this Court invoked in *EEOC v. Shell Oil Co.*, 466 U.S. at 72 n. 26. See *NLRB v. Martins Ferry Hospital Ass'n*, 649 F.2d 445, 448 (6th Cir.), cert. denied, 454 U.S. 1083 (1981).

these concerns meant to impose a fundamental, yet unstated, limitation on the Commission's authority to investigate claims of discrimination in higher education.

C. The Principle That Statutes Should Be Interpreted To Avoid Serious Constitutional Issues Does Not Support Petitioner's Claim

The language, structure, and legislative history of Title VII leave no room for application of the principle that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988). See *Public Citizen v. Department of Justice*, 109 S. Ct. 2558, 2572-2573 (1989); *City of Rome v. United States*, 446 U.S. 156, 173 (1980). "[T]his canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication," *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986), particularly where the proposed interpretation would have a "crippling effect" on an agency's enforcement authority, *id.* at 843.

It is not "fairly possible" to read Title VII to provide the qualified immunity that petitioner seeks. *E.g.*, *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The statute's plain language and legislative history reflect an "affirmative intention of the Congress clearly expressed," *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)), to give the Commission access to any evidence relevant to its investigations, whether or not the employer is a university, and, when necessary, a right to judicial enforcement of that access. We turn, therefore, to petitioner's claims that such an immunity may be found outside Title VII—in the First Amendment or the common law.

III. TITLE VII'S SUBPOENA ENFORCEMENT PROVISIONS ARE CONSTITUTIONAL AS APPLIED TO TENURE REVIEW MATERIALS

Petitioner's essential constitutional submission is that Title VII's subpoena enforcement provisions are unconstitutional as applied to tenure review materials, unless the Commission is required to demonstrate that its need for information outweighs petitioner's asserted interest in the confidentiality of those documents. Pet. Br. 11, 32-37. It contends that under the First Amendment a university must have "some degree of autonomy"—the freedom "to determine . . . on academic grounds who may teach." Pet. Br. 16, 17 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)). Describing a confidential "peer-reviewed tenure process" as a "central component" of that freedom, it argues that enforcement of subpoenas in accordance with the terms of the Act would impermissibly infringe on its autonomy.

For several reasons, that claim should be rejected. The purpose of an EEOC investigation, the enforcement of the Act's prohibition on invidious discrimination, threatens no interference with constitutionally protected activity. Moreover, disclosure of evidence relevant to a claim of discrimination imposes no legally significant burden on participants in tenure determinations. Even if it did, there is a "substantial relation" (*Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 92 (1982)) between a request for information relevant to a sworn charge of discrimination and the overriding and compelling public interest in eliminating discrimination from institutions of higher education. Because that relationship has been demonstrated on the facts of this case, the First Amendment imposes no obstacle to enforcement of the subpoena at issue here. Finally, the First Amendment should not be construed to require a showing that would hamstring the Commission's efforts to enforce Title VII.

A. Enforcement of the Act's Substantive Prohibition on Invidious Discrimination Involves No Infringement on Academic Freedom

The effect of an EEOC subpoena cannot be considered in isolation from the nature of the inquiry it advances. The only purpose of an EEOC investigation is to enforce the Act's substantive prohibition on invidious discrimination—a purpose that entails no interference with any constitutionally protected activity.

Title VII's prohibition on discrimination does not limit a university's freedom "to determine for itself *on academic grounds* who may teach." *Sweezy v. New Hampshire*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (emphasis added).¹⁹ The Act provides "that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1784 (plurality opinion).

¹⁹ Although the Court has never clarified the extent to which the First Amendment protects the institutional autonomy of academic institutions, we assume for purposes of this case that the First Amendment provides protection for a university's freedom to determine on academic grounds who will teach.

The term "academic freedom" can refer to a variety of interests—among them, the interest of students in deciding what they will study, see *Board of Education v. Pico*, 457 U.S. 853 (1982); *Healy v. James*, 408 U.S. 169, 180-181 (1972); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (referring to "learning-freedom"); the interests of faculty members in deciding what to study and teach and in being judged solely on the basis of academic merit, see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Cooper v. Ross*, 472 F. Supp. 802, 804-808 (E.D. Ark. 1979); and the interest of members of the academic community in avoiding government regulation or judicial oversight, *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225-226 & n.12 (1985). The Court's decisions do not settle the extent to which each of these interests is entitled to constitutional protection, or, since they can be contradictory (*id.* at 226 n.12), their relative importance. As we shall elaborate, this case involves a conflict between two strains of academic freedom, the interest of institutional autonomy advanced by petitioner and the interest of individual

In keeping with Title VII's "preservation of employers' remaining freedom of choice," *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1786 (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. Absent evidence that a tenure decision has been influenced by invidious discrimination, "universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities." *Zahorik v. Cornell University*, 729 F.2d 85, 94 (2d Cir. 1984).²⁰ Under the Act, a university is free to use a tenure system to protect the independence of its faculty, and to apply any non-discriminatory procedures or criteria that it wishes to tenure determinations. A Commission subpoena is not an "express or implied command" that any university or its faculty conform to any point of view, and it does not interfere with the ability of any member of the academic community to speak, publish, pursue information, or engage in public debate. Compare *Branzburg v. Hayes*, 408 U.S. at 681.

faculty members in being considered for promotion on academic grounds without invidious discrimination.

The concept of academic freedom was virtually unknown in this country until after the Civil War. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265, 1265-1266 (1988); Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817, 822-829 (1983). See generally R. Hofstadter & W. Metzger, *The Development of Academic Freedom in the United States* (1955). Commentators have noted the distinction between two concepts of academic freedom: (1) principles governing relationships within the academic community that its members suggest should be adopted, and (2) legal principles derived from the Constitution. See Metzger, *supra*, 66 Tex. L. Rev. at 1267-1322 (comparing the "professional definition" and "constitutional definition" of academic freedom); Finkin, *supra*, 61 Tex. L. Rev. at 84; n.94 ("There is an annoying tendency among some legal commentators to treat academic freedom as arising full blown out of the first amendment, like Athena out of Zeus' head. . . . The law of academic freedom involves less the creation of novel first amendment arguments than the more subtle (and as yet imperfectly realized) process of constitutional assimilation of an older, largely nonconstitutional idea.").

²⁰ Accord, e.g., *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532, 547-548 (3d Cir. 1980).

Similarly, Title VII's prohibition of invidious discrimination does not restrict the constitutionally protected freedom of association of a university or the members of an academic community. In *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), this Court noted that "while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'" (quoting *Norwood v. Harrison*, 413 U.S. 455, 469-470 (1973)). Accord *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Thus, by prohibiting invidious discrimination, Title VII does not impermissibly limit the right of the members of a university community to engage in "intimate" or "expressive" association. See *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2233-2234 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544-549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-628 (1984).

Indeed, rigorous enforcement of Title VII is supportive of an important element of academic freedom—the individual academic's important interest in having his or her tenure determination based solely on legitimate, nondiscriminatory grounds. Academic freedom includes "a commitment to protect faculty members from retributive action not only for what they say and do, but also for what they are." AAUP, *On Processing Complaints of Discrimination on the Basis of Sex* (1978), reprinted in *AAUP Policy Documents & Reports* 74 (1984). Protection of individual rights under Title VII is not "inimical to academic freedom and educational excellence; in fact, fair consideration is an essential condition for academic freedom." Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 Tex. L. Rev. 1591, 1608 (1988). Thus, although enforcement of Title VII may involve government inquiry into the employment decisions of academic institutions, the purpose of that inquiry is entirely consistent with ideals of academic freedom.

B. The Commission's Subpoenas Do Not Burden the Freedom Of Universities to Select the Members of Their Faculties on Academic Grounds

This Court has never suggested that academic freedom protects a college or university from legitimate inquiries for purposes unrelated to the suppression of protected activity. In *Barenblatt v. United States*, 360 U.S. 109, 112 (1959), the Court noted that although it would be "on the alert" against intrusion into "academic teaching-freedom and its corollary learning-freedom:"

An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.

See *id.* at 129. Similarly, though the Court has cautioned that "judges * * * asked to review the substance of a genuinely academic decision * * * should show great respect for the faculty's professional judgment," *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), it has never intimated that this deference extends to curtailing an investigation into whether a decision in fact reflects academic considerations. Where a university is alleged to have infringed an individual's rights, it can invoke legitimate academic considerations to justify its actions, but it has no "constitutional shield," *Branzburg v. Hayes*, 408 U.S. at 697, against investigation of the claim.

Nor are universities unique in their obligation to comply with Title VII with respect to employees engaged in activities protected by the First Amendment. Many employers covered by the Act employ writers, editors, musicians, or others engaged in expressive activities. Universities have no greater claim than the news media to protection from any "incidental burdening * * * that may result from the enforcement of civil or criminal statutes of general applicability," *Branzburg v. Hayes*, 408 U.S. at 682. "[O]therwise valid laws serving substantial public interests may be enforced * * *, despite the possible burden that may be imposed." *Id.* at 682-683; *Konigsberg v. State Bar*, 366 U.S. 36,

49-51 (1961). For a number of reasons, compliance with an EEOC subpoena involves no burden sufficient to justify petitioner's broad claim of privilege.

a. By contrast to all of the situations in which the Court has held compelled disclosures of information violative of the First Amendment, the claim that compliance with EEOC subpoenas will burden a university's ability to select the members of its tenured faculty is remote and speculative. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 765-767 (1986); *Brown v. Socialist Workers*, *supra*; *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). See generally *Buckley v. Valeo*, 424 U.S. 1, 64-74 (1976). Disclosure of tenure review materials does not involve any interference with petitioner's freedom to apply academic criteria of its choice to tenure determinations, or with the rights of free speech or association of individual professors, the sources of petitioner's constitutional claim. Nor does disclosure attach any significant penalty to participation in a tenure determination. Engaging in review of one's peers is a respected part of an academic's career, if not a professional responsibility. Members of the academic community regularly engage in and expose themselves to published criticism of the merits of one another's scholarly work. The possibility of disclosure of a peer reviewer's evaluation thus does not introduce an alien element into the academic environment. Nor would disclosure expose the reviewer to a threat of economic or physical injury, harassment, criminal or civil liability, or even to close scrutiny in an EEOC investigation.²¹ Disclosure under

²¹ The issue in a Title VII case arising from a claim of intentional discrimination is whether the persons who made an employment decision did so on impermissibly discriminatory grounds. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1785 (1989) (plurality opinion); *id.* at 1795 (White, J., concurring in the judgment); *id.* at 1804-1805 (O'Connor, J., concurring in the judgment); *id.* at 1807, 1813 (Kennedy, J., dissenting). Thus, a person who submits a written evaluation that contains evidence of bias but does not participate further in the decision is not even a potential witness; his or her intention is immaterial. The issue is whether any such "discriminatory input" (*id.* at

these circumstances involves no "significant encroachment upon personal liberty," i.e., "the threat of substantial government encroachment upon important and traditional aspects of individual freedom" that is "neither speculative nor remote." *Bates v. Little Rock*, 361 U.S. at 524. See *Branzburg v. Hayes*, 408 U.S. at 699-700.

b. Petitioner cannot demonstrate that confidentiality is essential to effective peer review. The features of tenure review systems in this country vary widely. Contrary to petitioner's assertions (see Pet. Br. 20-21), it is not true that "[a]ll peer review evaluations traditionally have been provided with express or implied assurances of confidentiality." According to one recent study of nearly one hundred liberal arts colleges, practices vary. G. Bednash, *The Relationship Between Access and Selectivity in Tenure Review Outcomes* (1989) (Ph.D. Dissertation, University of Maryland).²² Approximately 51% of the surveyed colleges allowed a tenure candidate to learn the identity of outside reviewers. *Id.* at 111, 321. Approximately 36% of the institutions in the study allowed candidates to have access to internal peer evaluations, and 23.9% allowed candidates to determine the identity of the internal reviewers. *Id.* at 110-111. Approximately 29% allowed tenure candidates access to evaluations by outside reviewers; 17.4% allowed the candidates to link those evaluations to the reviewers involved. *Ibid.* Substantial percentages of the institutions surveyed provided candidates with

1804 (O'Connor, J., concurring in the judgment)) sufficiently affected the outcome of the decision.

Of course, to the extent that fear of exposure leads either reviewers or decisionmakers to examine their judgments to avoid discrimination, the possibility of disclosure advances both the purposes of Title VII and the university's interest in basing tenure decisions on academic merit. Petitioner argues that disclosure will result in more arbitrary, and potentially more discriminatory, tenure determinations. Pet. Br. 36. The Court rejected an analogue of that contention in *Herbert v. Lando*, 441 U.S. 153, 174 (1979), saying that exposure to liability and inquiry would give the press "more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion." In any event, Congress made the decision to extend Title VII to universities, and the wisdom of that choice is not subject to reexamination by the courts.

²² We have lodged a copy of this dissertation with the Clerk and served copies upon counsel.

information on committee proceedings and departmental recommendations. *Id.* at 112-114. To be sure, the predominant practice in the institutions surveyed was to deny the applicant for tenure access to most aspects of the tenure review process. Nevertheless, these survey results are not consistent with the assumption that the tenure review process is invariably closed and confidential.²³ Even within the academic community, the degree of confidentiality required for tenure review materials, like virtually all aspects of tenure procedures, is subject to debate. Compare *Branzburg v. Hayes*, 408 U.S. at 693-694 & nn.32-33.²⁴

c. Petitioner's proposed qualified privilege is not limited to participants in tenure decisions who can legitimately assert a need for confidentiality.²⁵ As the facts of this case reflect, petitioner claims an equal measure of protection for evaluations prepared by inside and outside reviewers, input provided by its leadership, such as the Chairman of Tung's Department, and all records of the internal deliberations that have preceded a particular tenure determination. See p. 3, *supra*. However, any assertion that persons who occupy positions of leadership or serve on committees whose function is to evaluate candidates for tenure require complete confidentiality to perform their work is insupportable. A university's leadership and decision-makers cannot rely on doubts as to their own commitment to

²³ Another conclusion of the Bednash study undermines "the widespread assumption that selectivity requires confidentiality." G. Bednash, *supra*, at 322. Ms. Bednash found that "[t]he degree of selectivity evidenced in [the surveyed] institutions is *not* related to the degree of access available to tenure candidates. * * * Or to put it in reverse form, the data indicate conclusively that confidential tenure review processes do not increase the degree of selectivity exercised by the college." *Ibid.* See also *Paul v. Leland Stanford University*, 46 Fair Empl. Prac. Cas. (BNA) 1350, 1351 (N.D. Cal. 1986) ("[I]t is not clear that an assured cloak of secrecy improves the quality of decision-making or is an essential prerequisite to acquiring thoughtful evaluations of the qualifications of young academics.").

²⁴ Indeed, petitioner's amici are in disagreement on this point. See Harvard Br. 23; Stanford Br. 8; AAUP Br. 13-14.

²⁵ See *Herbert v. Lando*, 441 U.S. at 170 ("the outer boundaries of the editorial privilege now urged are difficult to perceive").

candor and the excellence of their institutions to shield their actions from inquiry.²⁶ When a charge of discrimination is filed, "the [academic] decisionmaker will be called upon to explain his actions. If that means that a few weak-willed individuals will be deterred from serving in positions of trust, so be it." *In re Dinan*, 661 F.2d 426, 432 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982). Similarly, an academic community can reasonably be expected to secure from its own members candid and responsible evaluations of persons who seek tenured positions, notwithstanding the slight risk that those evaluations may someday be disclosed to the EEOC.

d. Disclosure of tenure review materials to the EEOC involves only a limited inroad on their confidentiality, and a correspondingly limited threat to any assertedly protected interest. Compare *Branzburg v. Hayes*, 408 U.S. at 700 (grand jury secrecy "is a further protection against the undue invasion of [First Amendment] rights"), with *Brown v. Socialist Workers*, 459 U.S. at 97-98 n.14 (public records of contributors and recipients of campaign funds); *Shelton v. Tucker*, 364 U.S. at 486 & n.7 (public exposure of associations of school teachers); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 765-767 (public disclosure of details of abortions). As noted above, it is unlawful for the Commission to make public any information that the Commission obtains in an investigation in advance of litigation. 42 U.S.C. 2000e-8(e). Although the prohibition does not apply to disclosure to the charging party, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), or to witnesses when dis-

²⁶ In *NAACP v. Alabama*, 357 U.S. at 463-464, the Court took care to note that the leadership of the NAACP claimed no immunity from inquiry for its leadership:

As shown by its substantial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the purposes of the Association and its activities within the State. Petitioner has not objected to divulging the identity of its members who are employed by or hold official positions with it. It has urged the rights solely of its ordinary rank-and-file members.

Accord *Brown v. Socialist Workers*, 459 U.S. at 90-91 (nondisclosure limited to contributors and recipients of campaign funds).

closure is "necessary for securing appropriate relief," 29 C.F.R. 1601.22, the statute does protect participants in peer review from unjustified dissemination of confidential materials.²⁷

e. The likelihood that any particular evaluation will be disclosed even to the EEOC is small. There has been no showing that a substantial percentage of tenure determinations are the subject of sworn charges filed under Title VII. Further, tenure review materials are sought by the Commission only when they are relevant to such a charge. Literal enforcement of Title VII hardly presents peer reviewers with "the knowledge of certain disclosure." Pet. Br. 46 n.46. Cf. *Herbert v. Lando*, 441 U.S. at 174 (finding it "difficult to believe" that the editorial process would be stifled because it will be "examined in the tiny percentage of instances in which error is claimed and litigation ensues"); *Branzburg v. Hayes*, 408 U.S. at 691 ("[n]othing before us indicates that a large number or percentage of *all* confidential news sources" will be implicated in crimes or possess evidence relevant to a grand jury investigation).

f. Individuals who find the foregoing assurances of confidentiality inadequate will derive no comfort from petitioner's qualified privilege, which would permit disclosure whenever confidential information "will substantially promote the fact-finding process" (Pet. Br. 46). Even those courts that have adopted a balancing test have required disclosure of tenure review materials when a university has relied on alleged deficiencies in the candidate's scholarship to justify an adverse tenure decision. See p. 40, note 34, *infra*. Thus, a reviewer can be

²⁷ Before the Commission will allow charging parties to review their files, it requires them to execute an agreement not to disclose the contents for purposes other than the pursuit of legal remedies under the Act. 1 EEOC Compliance Manual § 83.4(c) (1982). In *Stebbins v. Insurance Co. of North America*, No. 82-1915 (D.D.C. Jan. 27, 1983), the EEOC obtained summary judgment dismissing a Freedom of Information Act claim initiated to obtain Commission investigation files by a Title VII complainant who had refused to sign an agreement not to disclose the information to third parties. There is no evidence that the Commission's procedures have been ineffective in controlling dissemination of confidential materials.

guaranteed confidentiality only if he is assured that the university will not rely on his evaluation. Since peer reviews are solicited on the assumption that they will be used, no such guarantee is possible. Cf. *Branzburg v. Hayes*, 408 U.S. at 702-703 & n.39 (1972) ("If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.").

When it extended Title VII to educational institutions, Congress found that discrimination was widespread in colleges and universities. To remedy that discrimination, Congress exposed tenure decisions to the same degree of scrutiny, no more and no less, as any other employment decision. According to petitioner, that scrutiny must now be moderated to avoid various supposed ill effects on the tenure review process (see Pet. Br. 34-36).²⁸ However, academics cannot rely on any limitations in

²⁸ We note that petitioner's argument is based substantially on affidavits that petitioner has lodged with this Court. Petitioner asserts that it was "precluded from presenting any affidavits or other evidence relating to" its claim that it had a First Amendment defense to the subpoena to the district court. Pet. Br. 7 n.6. The record does not support that assertion. When the Commission applied for enforcement of its subpoena, the district court entered an order to show cause requiring petitioner to present its defenses to the subpoena by a date certain. J.A. 1 (June 23, 1987 order). Nevertheless, in its written response to the order, petitioner elected to raise only procedural objections to the application for enforcement of the subpoena. C.A. J.A. 29-43. After arguing its First Amendment defense briefly to the district court in oral argument (C.A. J.A. 66-69), petitioner filed requests for documents and interrogatories inquiring primarily into the process through which the Commission had decided to deny its application for modification of the subpoena (C.A. J.A. 77-87). The order quoted in petitioner's brief to support its contention that it was denied a full opportunity to present its position on the merits was the district court's order refusing to compel compliance with those discovery requests. Pet. App. A35.

Petitioner (which was pursuing an anticipatory lawsuit in the District of Columbia) made no effort to submit any factual material relevant to its First Amendment claim to either of the courts below until after the court of appeals had issued its decision. On July 8, 1988, it sought leave to submit its affidavits as an attachment to a petition for rehearing of the court of appeals' decision. In an order dated August 1, 1988, the court of appeals refused to receive petitioner's affidavits. See J.A. 3 (August 1, 1988 order). The affidavits are outside the record, and are not properly before this Court.

their own commitment to candor, collegiality, and the excellence of their institutions as the basis for an exemption from Title VII. The concerns that participants in a tenure review process may feel when they consider the slight possibility that tenure review materials will be disclosed to the Commission do not distinguish them from other private and public employers who must also strive to promote the best from within their ranks while complying with the requirements of Title VII.

C. There Is a Substantial Relation Between A Request for Information Relevant to a Sworn Charge of Discrimination and the Compelling National Interest in the Elimination of Discrimination from Institutions of Higher Education

Because subpoenas issued in accordance with Title VII do not suppress protected activity and impose no significant burden on a university's freedom to choose its faculty members on non-discriminatory grounds, no special showing of justification is required to sustain Title VII's constitutionality as applied to tenure review materials in general or to the subpoena involved in this case. Compare *Branzburg v. Hayes*, 408 U.S. at 699-700. But in any event, subpoenas issued under Title VII satisfy even the stricter standards applicable to compelled disclosures that, unlike these, involve a "significant encroachment upon personal liberty," *Bates v. Little Rock*, 361 U.S. at 524. When, as in this case, tenure review materials are relevant to a claim of discrimination, there is a "substantial relation" between the Commission's request for those materials and "an overriding and compelling state interest." *Brown v. Socialist Workers*, 459 U.S. at 92 (quoting *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. at 546). Accord *Buckley v. Valeo*, 424 U.S. at 64. Nothing more is required to sustain the constitutionality of a Commission subpoena.

1. Petitioner concedes that the elimination of invidious discrimination in employment is a "compelling interest." Pet. Br. 45. In fact, it is a national goal of the "highest priority." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). The committee reports accompanying the legislation that extended

Title VII to educational institutions emphasized the singular importance of eliminating discrimination in educational institutions at all levels. The Senate Report noted that discriminatory practices in those institutions "parallel the same kinds of illegal actions which are encountered in other sectors of business" (S. Rep. No. 415, *supra*, at 11), and the House Report referred specifically and at length to the problems that women and minorities were encountering in institutions of higher learning (H.R. Rep. No. 238, *supra*, at 19-20). Because of the role that schools play in shaping future societal attitudes toward discrimination, the elimination of discrimination in that setting was considered, and remains, "particularly critical." S. Rep. No. 415, *supra*, at 12.

2. a. Contrary to petitioner's extravagant characterizations, the means that Congress chose to end discrimination in employment do not authorize the Commission to demand "automatic disclosures" of or "unbridled access" to employment records (see, e.g., Pet. Br. 11, 13, 45). The Commission's subpoena authority is limited to evidence relevant to a specific, sworn charge of discrimination, which sets forth, inter alia, "a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. 1601.12.²⁹ Before a subpoena can be enforced, the Act provides the employer with two opportunities to contest the subpoena's compliance with applicable statutory standards. The employer may apply to the Commission for modification or revocation of the subpoena, advancing arguments addressed to both the Commission's power and its discretion. See 29 U.S.C. 161(1); 29 C.F.R. 1601.16(b). If the Commission denies the application, the employer can obtain judicial review when the Commission applies for enforcement of the subpoena, limited by the standards set out in *Shell Oil*.

These statutory provisions are sufficient to protect universities, like other employers, against disclosures that have no

²⁹ In this respect, the Commission's authority to issue subpoenas is somewhat narrower than that conferred on some agencies. See *EEOC v. Shell Oil Co.*, 466 U.S. at 64-65.

"substantial relation" to the compelling interest in investigating and remediating specific claims of unlawful discrimination. None of the cases on which petitioner relies (see Pet. Br. 14, 45-46) suggests that a subpoena is insufficiently related to a legitimate interest unless a court first determines that the government's need for particular information "outweighs" a private party's interest in withholding it.

In *Barenblatt v. United States*, *supra*, the Court upheld the legitimacy of a congressional committee's inquiries into whether a witness and others were members of the Communist party after it determined that the "investigation was related to a valid legislative purpose," and that there were no factors indicating an abuse of the committee's investigatory authority. 360 U.S. at 127, 130. The Court refused to deny the committee's power to require a response to its inquiries "solely because the field of education is involved" (*id.* at 129), and it did not remotely suggest that the committee could be required to make a showing of supervening need before compelling responses to its questions.

Similarly, in his concurring opinion in *Branzburg v. Hayes*, Justice Powell emphasized that judicial relief would be available in cases in which a "newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710; see *id.* at 710 n.* (referring to judicial protection from "improper or prejudicial" questioning).³⁰ Justice Powell joined with the other members of the majority in rejecting a privilege indistinguishable from that proposed by petitioner in this case, explaining that such a limitation on the investigatory power of the

³⁰ Justice Powell described his opinion as an elaboration on a portion of the majority opinion that stated, similarly (408 U.S. at 707):

[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

grand jury would "heavily subordinate[]" the "essential societal interest in the detection and prosecution of crime" (*ibid.*).³¹ The opinions that petitioner cites for its case-by-case balancing test actually suggest only that judicial relief will be available if an investigation is not being conducted for a proper purpose or the information sought bears no reasonable relationship to a legitimate subject of inquiry.³² The procedures under the Act and the standards recognized in *Shell Oil* fully protect employers against subpoenas of that type.

b. There can be no claim that the subpoena in this case lacks the requisite relation to the Act's objective of eliminating discrimination. Tung's charge alleged that the denial of her tenure was attributable in part to an unfairly derogatory letter authored by the Chairman of her Department. J.A. 28-29. Petitioner refused to produce that letter. C.A. J.A. 5.³³ The charge also alleged that five male faculty members whose qualifications were no better than Tung's had been treated more favorably.

³¹ *Branzburg* rejected the claim that a reporter "should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime that the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure." 408 U.S. at 680; see *id.* at 743 (Stewart, J., dissenting). The similarity to petitioner's position is striking. See Pet. Br. 45-46.

³² In *Shelton v. Tucker*, *supra*, the Court held that a requirement that a teacher disclose "every single organization with which he has been associated over a five-year period" went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers." 364 U.S. at 487-488, 490. In *Bates v. Little Rock*, *supra*, municipalities claimed that they needed NAACP membership lists to ascertain the organization's liability for license taxes. The Court found a "complete failure" to show any connection between the inquiry and that purpose. 361 U.S. at 527. See also *Sweezy v. New Hampshire*, 354 U.S. at 251 ("nothing to connect the questioning of petitioner with [the] fundamental interest of the State" in self-preservation).

³³ As a result, the Commission has been unable to consider, among other things, whether that evaluation reflects a change of mind about Tung's qualifications that might correspond to her allegation of sexual harassment.

J.A. 29. Petitioner refused to produce portions of its files on them. C.A. J.A. 8. Indeed, petitioner's claim of privilege covered not only evaluations of Tung's scholarship, but also the contemporaneous documents disclosing the reasons for its decision—"documents reflecting the internal deliberations of faculty committees considering applications for tenure." C.A. J.A. 9.

In its letter advancing non-discriminatory justifications for denying Tung tenure, petitioner repeatedly relied on the materials it has withheld from the Commission. Hamburg Letter, *supra*. Referring to "serious concerns" that members of the Personnel Committee had expressed concerning Tung's scholarship, the letter cited "similar reservations expressed in some of the letters and reviews from the candidate's peer group evaluators outside the University." *Id.* at 1. It noted that the Personnel Committee's deliberations "included discussions of the documents submitted by the Management Department, which contained the department chairman's letter, the report of the department evaluation committee, and letters of recommendation from colleagues both inside and outside the University" and described the general tone of each category of materials. *Id.* at 2. Petitioner thus seeks to justify its decision by reference to the same documents—from inside and outside evaluators and the Management Department's chairman and evaluation committee—that it has withheld from the Commission.³⁴

³⁴ Even those courts that have expressed support for a qualified privilege or balancing approach to tenure review materials have required their production when a university relies on them as a defense to a claim of discrimination. *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331, 339 (7th Cir. 1983); *Gray v. Board of Higher Education*, 692 F.2d 901, 906 (2d Cir. 1982); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1346-1347 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), cert. denied, 434 U.S. 904 (1977); *Zautinsky v. University of California*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), aff'd, 782 F.2d 1055 (9th Cir. 1985) (Table). Petitioner appears to concede that "if the university relies upon the confidential letters to justify its tenure decision, it often will be necessary to have those documents made available to the EEOC." Pet. Br. 46. But, quite inconsistently, it does not see this case as one calling for application of that principle. *Ibid.*

Contrary to petitioner's contention (Pet. Br. 14), the Commission has carefully explained why it needs the materials that have been withheld. In its decision denying petitioner's application for modification of the subpoena, the Commission stated that the information from files for faculty members other than Tung was "necessary in order to determine whether Ms. Tung was treated differently than those who received tenure" (Pet. App. A30).³⁵ It also emphasized the importance of probing petitioner's stated reasons for its decision, noting that the Commission would "fall short of its obligation" to investigate claims of discrimination "if it stopped its investigation once [an employer] has provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination." *Id.* at A32. Plainly, that entirely legitimate inquiry cannot be concluded without examining the evaluations on which petitioner claims to have relied and the records of deliberations that culminated in its adverse tenure determination. Many, if not all, investigations of claims of discrimination would be futile if the Commission were required to demonstrate the insufficiency of claimed bona fide grounds for an employment decision *before* it could obtain access to documents reflecting the factors on which the decision was actually based. Recognition of a privilege of this type would place out of reach "a range of direct evidence relevant to proving" that discriminatory factors influenced an employment decision. Cf. *Herbert v. Lando*, 441 U.S. at 169-170. Nothing in the First Amendment requires or justifies that result.

³⁵ An internal university grievance panel considered Tung's allegation that she was the victim of sex discrimination. Its report was filed in petitioner's District of Columbia action. For present purposes, it is telling that the panel deemed it appropriate to examine the tenure files on 11 recent favorable tenure decisions at petitioner's Wharton School, as well as Tung's file, in order to determine whether standards for tenure were being consistently applied. Report of Grievance Panel, at 3. By contrast, the subpoena at issue here sought five comparable files.

D. Petitioner's Qualified Privilege Would Seriously Hamper and Delay Enforcement of Title VII

Finally, petitioner's proposed constitutional privilege should be rejected because it would unduly hinder enforcement of Title VII. Making enforcement of the Commission's subpoenas dependent on a finding, "based on a variety of factors, [that the Commission] has demonstrated a specific reason for disclosure that 'outweighs' the university's interest in confidentiality" (Pet. Br. 45-46) would place a substantial, litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination.³⁶

Though petitioner is understandably vague in describing how its test would operate in practice, the contentions that could be brought within that test's bounds would be limited only by the imagination. In the final analysis, the test involves a balance between intangibles—the Commission's need for information against a university's interest in confidentiality—in the context of a particular investigation. To strike such a balance, a court would presumably have to inform itself of the status of the Commission's investigation on the one hand and the particular facts that bear on the university's countervailing interest in confidentiality, assign a weight to the parties' concerns, and compare them. Petitioner apparently contemplates that there would be extensive litigation on the question whether "readily available evidence" (Pet. Br. 26) supported the charge of discrimination or suggested that additional evidence of discrimination could be found in tenure files, an inquiry "plainly inconsistent with the structure of [Title VII's] enforcement procedure," *EEOC v. Shell Oil Co.*, 466 U.S. at 71. The balance would have to be struck, petitioner argues, not only as to a par-

³⁶ Though petitioner's proposed balancing test is vague, some insight may be drawn from petitioner's citations (Pet. Br. 46) to *EEOC v. University of Notre Dame*, 715 F.2d at 338, *United States v. Nixon*, 418 U.S. 683, 708-713 (1974), and *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). Apparently, petitioner contemplates that the EEOC should be required to make a showing similar to that needed to justify disclosure of grand jury materials or communications between the President and his highest aides with respect to each piece of tenure review material.

ticular investigation or particular documents, but even as to the nature of the redactions that would be permitted in particular cases, in repeated rounds of litigation. Pet. Br. 47 nn.47-48. See *EEOC v. University of Notre Dame*, 715 F.2d at 339 ("substantial showing of particularized need must be demonstrated to the satisfaction of the court each and every time the EEOC seeks additional privileged material").

Obviously, a qualified privilege of this type would generate virtually endless opportunities for procedural skirmishing. A university faced with an affidavit explaining why the Commission had subpoenaed tenure review files might well seek discovery or file countervailing affidavits and seek to have disputes resolved at a hearing. Cf. *Branzburg v. Hayes*, 408 U.S. at 705 ("In each instance where a reporter is subpoenaed to testify, the courts would * * * be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance * * *").

When the Court rejected a far more modest threshold requirement for enforcement of an EEOC subpoena in *Shell Oil*, it emphasized the importance of preserving the Commission's unencumbered access to relevant information. Recognizing that litigation over the form of the charge and subsequent appeals "would substantially slow the process by which the EEOC obtains judicial authorization to proceed with its inquiries," the Court was unwilling to "place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC." 466 U.S. at 81. Accord *id.* at 93 (O'Connor, J., concurring in part and dissenting in part) (the Commission has a "strong interest in avoiding a 'minitrial' on every discovery request").³⁷ The qualified privilege petitioner advocates should be rejected for the same reason.

³⁷ In keeping with the Act's emphasis on effective enforcement, the courts of appeals have refused to allow employers to burden subpoena enforcement proceedings with discovery and time-consuming litigation on threshold issues. See, e.g., *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987); *EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 783 (7th Cir. 1983), cert. denied, 466

IV. THERE IS NO COMMON LAW PRIVILEGE PROTECTING TENURE REVIEW MATERIALS RELEVANT TO AN EEOC INVESTIGATION

Petitioner also contends that a qualified privilege for tenure review materials may be found in the common law, "interpreted * * * in the light of reason and experience," Fed. R. Evid. 501. However, a legal privilege may not be based, as petitioner maintains, on this Court's assessment of the relative importance of the interests of universities and the Commission in tenure review materials. Title VII strikes that balance, and the statute should be enforced in accordance with its terms. In any event, petitioner cannot demonstrate that the interests its proposed privilege would serve have the importance or legal recognition required to justify a new evidentiary privilege.

1. Like other statutes conferring authority on administrative agencies to issue and obtain enforcement of subpoenas, Title VII does not override established, generally-applicable privileges. For instance, persons served with subpoenas may assert a valid attorney-client or work-product privilege as an excuse for withholding a document. See *United States v. Euge*, 444 U.S. 707, 714 (1980). Although Congress undoubtedly has the power to abolish or narrow a common law privilege, statutes giving an agency authority to obtain relevant evidence are understood to incorporate the privileges that apply to evidence in all legal proceedings.

U.S. 936 (1984); *In re EEOC*, 709 F.2d 392, 402 (5th Cir. 1983). *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 311 (7th Cir. 1981).

In *Tempel Steel*, for instance, the Seventh Circuit explained that the role of a court asked to enforce a subpoena is "sharply limited" and continued (814 F.2d at 485):

Such proceedings are designed to be summary in nature. * * * As long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant, the district court must enforce an administrative subpoena * * *.

If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay.

This case involves a far different privilege claim, questioning the justification for the very grant of the agency's investigatory power. When, as here, Congress has conferred a right on an agency to obtain relevant evidence, courts must respect that legislative assessment of the relative interests of the agency charged with enforcing federal law and the persons who possess that evidence. Cf. *Branzburg v. Hayes*, 408 U.S. at 706 ("By requiring testimony from a reporter in investigations involving some crimes but not in others, [courts] would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution."). The extension of Title VII to universities in 1972 similarly manifests a "considered legislative judgment, not constitutionally suspect" that universities should be subject to the enforcement provisions of Title VII. A court should not, under the guise of determining whether a common law privilege exists, contradict that legislative judgment. As the Third Circuit recognized, Title VII is a "clear mandate" subjecting academic institutions to the express requirements of Title VII." Pet. App. A10 (quoting *EEOC v. Franklin & Marshall College*, 775 F.2d at 115).³⁸ It forecloses any privilege based on a court's assessment of the relative importance of the Commission's need for information and a university's interest in withholding it.

2. Even if petitioner's claim for a qualified privilege were not foreclosed by Title VII, applicable legal standards would

³⁸ By contrast, in *EEOC v. Notre Dame*, 715 F.2d at 337, the Seventh Circuit openly rebalanced the interests whose relative importance Title VII lays to rest:

It is clear that both parties before us have significant and substantial interests at stake. After weighing the respective interests, we recognize in this case a qualified academic freedom privilege * * *.

As petitioner notes (Pet. Br. 48 n.49), courts that have applied a "balancing approach" have employed a similar methodology—except that they do not even purport to identify the source of their authority to withhold relevant evidence from the party seeking it. See *Gray v. Board of Higher Education*, 692 F.2d at 904-905.

call for its rejection. "The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges * * * 'governed by the principles of the common law * * * in the light of reason and experience.' " *Trammel v. United States*, 445 U.S. 40, 47 (1980) (citation omitted). However, there is "a presumption against the existence of an asserted testimonial privilege." *Branzburg v. Hayes*, 408 U.S. at 686. The basis for that presumption is well established, *Trammel v. United States*, 445 U.S. at 50:

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States v. Bryan*, 339 U.S. 323, 331 (1950). As such they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Accord *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Petitioner's proposed privilege is not supported by interests of the type underlying the privileges that have been recognized by this Court.³⁹ In *United States v. Nixon*, 418 U.S. at 705-706, the Court determined that a qualified privilege for presidential communications is necessary to preserve the separation of powers between the Branches of the federal government. "[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Ibid.* See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151

³⁹ The fact that petitioner offers confidentiality to participants in its tenure review process does not enhance its privilege claim. "No pledge of privacy nor oath of secrecy can avail against demand for the truth." *Branzburg v. Hayes*, 408 U.S. at 682 n.21 (quoting 8 J. Wigmore, *Evidence* § 2286 (McNaughton rev. 1961)).

n.17 (1975). In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), the Court applied the rule of grand jury secrecy codified in Fed. R. Crim. P. 6(e). The Court noted that the rule dated back to the 17th century, was imported into our common law, and was eventually codified as "an integral part of our criminal justice system." 441 U.S. at 218 n.9. Similarly, *Clark v. United States*, 289 U.S. 1, 13-14 (1933), recognized a privilege for the votes and deliberations of a petit jury, noting that references to the privilege in dicta "bear with them the implications of an immemorial tradition." Finally, in *NLRB v. Sears, Roebuck & Co.*, *supra*, the Court construed an exception to FOIA in which Congress had incorporated a well-established privilege for deliberative, predecisional, intra-agency documents. See M. Larkin, *Federal Testimonial Privileges* § 5.02[2] (1988).⁴⁰ Petitioner's tenure review privilege has no similar constitutional, statutory, or historical basis. Even as a matter of first impression, a tenure committee's deliberations do not stand on the same legal footing as discussions between the President of the United States and his confidential aides, or the deliberations of a petit jury, a grand jury, or a government agency.

State law provides virtually no support for petitioner's position. One intermediate state appellate court has held that tenure review materials compiled by a public university are exempt from disclosure under the state's public disclosure statute. *Hafermehl v. University of Washington*, 29 Wash. App. 366, 628 P.2d 846 (1981).⁴¹ In California, the Court of Appeal, construing a state constitutional provision protecting the right to

⁴⁰ The Court recognized that privilege when it issued Fed. R. Evid. 509, 56 F.R.D. 183, 251 (1972), a rule which ultimately did not take effect. By contrast, neither the Advisory Committee, the Judicial Conference, nor this Court suggested that a federal privilege should be recognized for tenure review materials. See *United States v. Gillock*, 445 U.S. 360, 367-368 (1980).

⁴¹ In *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983), the court held that meetings on a professor's suitability for tenure were subject to the State's open meetings act. Compare Pet. Br. 29 (relying on Alaska law to support its claim for a qualified privilege).

privacy and a statute permitting employees to review their files, held that a professor was entitled to discovery of his personnel and tenure files with evaluators' names redacted. *Board of Trustees of Leland Stanford Junior University v. Superior Court*, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981).⁴² By contrast, a federal district court has construed a California statute protecting governmental deliberative documents to apply to the tenure review files of a public university. *McKillop v. Regents of the University of California*, 386 F. Supp. 1270 (N.D. Cal. 1975). In *Cockrell v. Middlebury College*, 148 Vt. 557, 536 A.2d 547 (1987), the Supreme Court of Vermont declined to reach the question whether tenure review materials were privileged under state law. As far as we can determine, no state statute protects tenure review materials as such.⁴³

3. Finally, the considerations we have addressed as foreclosing petitioner's constitutional claim also weigh heavily against recognition of a nonconstitutional privilege. Universities in this country do not agree on the proposition that confidentiality is essential to a peer review system. The proposed qualified privilege, rebuttable whenever access to tenure files would "substantially promote the factfinding process" (Pet. Br. 46), would not add significantly to the confidentiality of tenure decisions, but would seriously delay and hinder the Commission's investigations. In view of Congress's considered extension of Title VII to educational institutions, the Court should not recognize a novel privilege that would impair the Commission's ability to enforce the Act in that particularly critical setting.

⁴² The court declined to require production of an investigatory file pertaining to the plaintiff and files relating to the professor who had allegedly defamed the plaintiff, finding that they were not directly relevant to the claims in issue and that the privacy interest recognized by the state constitution took precedence over the plaintiff's need for discovery.

⁴³ Statutes protecting health professionals who participate on peer review committees (see Pet. Br. 30) obviously reflect no legislative judgment concerning the importance of confidentiality for tenure determinations. In *Branzburg v. Hayes*, 408 U.S. at 689 & n.27, 17 States had enacted legislation extending a privilege to newsmen as such.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

HARRY F. TEPKER, JR.
Attorney
Equal Employment Opportunity Commission

AUGUST 1989

REPLY
BRIEF

11

Supreme Court, U.S.

FILED

SEP 13 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. 88-493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNIVERSITY OF PENNSYLVANIA,
Petitioner,
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY BRIEF OF PETITIONER

SHELLEY Z. GREEN
NEIL J. HAMBURG
Office of the General Counsel
University of Pennsylvania
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
LOREEN M. MARCIL
JULI E. FARRIS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner

September 13, 1989

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. DISCLOSURE OF CONFIDENTIAL PEER REVIEW MATERIALS, WITHOUT ANY SPECIFIC SHOWING, WOULD INFRINGE BOTH THE UNIVERSITY'S RIGHT TO ACADEMIC FREEDOM UNDER THE FIRST AMENDMENT AND THE UNIVERSITY'S COMMON LAW QUALIFIED PRIVILEGE....	2
II. THIS COURT SHOULD CONSTRUE THE SUBPOENA ENFORCEMENT PROVISION OF TITLE VII NARROWLY TO AVOID CREATING A SUBSTANTIAL CONSTITUTIONAL QUESTION	10
III. A RULE REQUIRING DISCLOSURE UPON DEMAND OF CONFIDENTIAL PEER REVIEW MATERIALS IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST AND IS ACCORDINGLY UNCONSTITUTIONAL	14
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	3
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	6, 7, 8, 9
<i>Carey v. Population Serv. Int'l</i> , 431 U.S. 678 (1977)	3
<i>City of Akron v. Akron Center for Reproductive Health, Inc.</i> , 462 U.S. 416 (1983)	3, 7
<i>City of Canton v. Harris</i> , 109 S.Ct. 1197 (1989)	6
<i>Commodity Futures Trading Comm'n v. Schor</i> , 478 U.S. 833 (1986)	11
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3rd Cir. 1985), <i>cert. denied</i> , 476 U.S. 1163 (1986)	7
<i>EEOC v. University of Notre Dame Du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	6
<i>Gray v. Board of Higher Ed.</i> , 692 F.2d 901 (2d Cir. 1982)	8
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979), <i>cert. denied</i> , 476 U.S. 1182 (1986)	6, 7
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	10
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	2, 11, 12
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980) ..	17
<i>Public Citizen v. Department of Justice</i> , 109 S.Ct. 2558 (1989)	2, 11, 12
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	2
<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	10
<i>Constitutional Provisions, Statutes and Regulations</i>	
U.S. Const. amend. I	<i>passim</i>
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e	<i>passim</i>
29 C.F.R. § 1601-22	6
<i>Other Authorities</i>	
Note, <i>Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege</i> , 69 Cal. L. Rev. 1538 (1981)	5

TABLE OF AUTHORITIES—Continued

	Page
<i>Guidelines for Colleges and Universities</i> , American Council on Education, No. 7 (Dec. 1981)	4
<i>Report of the Committee on Confidentiality in Matters of Faculty Appointment</i> , U. Chi. Rec. 165 (May 22, 1979)	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-493

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

REPLY BRIEF OF PETITIONER

The Equal Employment Opportunity Commission's primary argument is that no privilege or protection can be afforded to confidential academic peer review documents because Title VII does not expressly provide for such protection. EEOC Br. 8-24. That argument misses the point: petitioner has never contended that such a privilege is mandated by the express terms of the statute itself, but instead, has argued that the privilege exists under the First Amendment and the common law. Pet. Br. 15-37. However, the Court ultimately need not decide whether such a privilege is constitutionally mandated because—despite the absence of an express privilege—Title VII reasonably can be construed to avoid the constitutional issue. Pet. Br. 37-41. Indeed, in the

absence of a clear statement that Congress intended to grant the EEOC investigatory authority that would create a "significant risk" of infringing First Amendment rights (*NLRB v. Catholic Bishop*, 440 U.S. 490, 504 (1979)), this Court should be "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets" *Public Citizen v. Department of Justice*, 109 S.Ct. 2558, 2572 (1989).

Thus, the central question in this case is whether the rule adopted below, which grants the EEOC blanket access to unquestionably sensitive confidential peer review documents, poses a realistic threat to conceded First Amendment values of academic freedom inherent in the tenure selection process. If so, the subpoena enforcement provisions of Title VII should be construed to recognize a qualified privilege for those documents. Such a privilege would accommodate the interests of colleges and universities with the EEOC's important mandate to eliminate discrimination in employment.

I. DISCLOSURE OF CONFIDENTIAL PEER REVIEW MATERIALS, WITHOUT ANY SPECIFIC SHOWING, WOULD INFRINGE BOTH THE UNIVERSITY'S RIGHT TO ACADEMIC FREEDOM UNDER THE FIRST AMENDMENT AND THE UNIVERSITY'S COMMON LAW QUALIFIED PRIVILEGE

The EEOC does not, nor frankly could it, dispute petitioner's claim that it has a First Amendment "freedom to determine on academic grounds who will teach." EEOC Br. 26 n.19. The EEOC also acknowledges that this Court's prior decisions recognize a constitutionally protected "interest of members of the academic community in avoiding government regulation or judicial oversight." *Id.*, citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). Thus, the critical issue before the Court is whether the EEOC's demand for unrestricted access to all tenure files infringes the insti-

tutional freedoms protected by the First Amendment and the common law.

A. The EEOC presents six arguments in support of its claim that the burden on petitioner's First Amendment rights is too insubstantial to warrant even a qualified privilege for its concededly confidential peer review files. None of these contentions has merit.

First, the EEOC argues (Br. 30) that the burden on petitioner's and other universities' tenure process is "remote and speculative" because the EEOC does not forbid or punish tenure decisions made on purely academic grounds. But this Court has repeatedly held that government regulation, which significantly, though only indirectly, impairs constitutionally protected activity, constitutes an infringement of the right. In *Carey v. Population Serv. Int'l*, 431 U.S. 678, 688 (1977), the Court held that government regulations which "substantially limit[] access to the means of effectuating" a protected choice "burden an individual's right" See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 430 (1983) (describing the standard in terms of "no significant impact"); *Bigelow v. Virginia*, 421 U.S. 809 (1975). Where, as here, the available evidence shows that the EEOC's actions will significantly impair the ability of petitioner and other academic institutions that employ a traditional tenure process to obtain candid peer review information, the conclusion is inescapable that the government's subpoena directly and concretely encroaches upon petitioner's personal liberty.

Second, the EEOC argues that disclosure upon demand of confidential peer review documents will not burden petitioner because "confidentiality is [not] essential to effective peer review." EEOC Br. 31-32. With the exception of an unpublished Ph.D. dissertation cited by the EEOC (which is based on a survey of "nearly one hun-

dred liberal arts colleges") the evidence is flatly to the contrary.¹

For example, the American Council on Education—which represents almost 1400 institutions of higher learning—states that a loss of confidentiality "will significantly alter the peer review process in a way that will damage the tenure system." Br. of American Council on Education, 13. The American Association of University Professors, which represents over 40,000 individual faculty members and scholars, similarly asserts that the "erosion of confidentiality" will "impair the quality of decisional processes". Br. of AAUP, 12. The same conclusion is echoed in *amici* briefs filed by individual institutions of higher learning, as well as in numerous affidavits submitted by faculty members and administrators from colleges and universities around the country which are cited in petitioner's brief. See Br. of Harvard College, 22 (disclosure of peer review evaluations and other tenure decisionmaking processes will "impair[] the tenure review process" and adversely affect university scholarship); Br. of Stanford University, *et al.*, 11 (loss of confidentiality would "destroy our ability to solicit and receive frank, detailed, and critical appraisals of tenure candidates"); Pet. Br. 19-21, 34-35.²

¹ Even if the author of that dissertation is correct in stating that some universities do not have peer-reviewed tenure systems, that fact is irrelevant. The fact that some universities do not fully exercise their First Amendment rights of academic freedom in the tenure review context does not mean, as the EEOC suggests, that they do not possess those rights.

² Recognition that confidentiality is essential to the proper functioning of the tenure review process (and thus to academic freedom) is not limited to this litigation. Various scholars, commentators and academic organizations have long identified the need for confidentiality in tenure decisionmaking. See *Guidelines for Colleges and Universities*, American Council on Education, No. 7 (Dec. 1981) ("Most educators believe that confidentiality . . . is crucial to [the peer review] process"); *Report of the Committee on Con-*

Moreover, the court below found that its decision requiring disclosure upon demand of confidential peer review documents would have a substantial detrimental impact on the academic freedom of American colleges and universities. The Third Circuit itself "acknowledged that the EEOC's position would burden the tenure review process and would impact on academic freedom." Pet. App. 10 The EEOC has not offered any reason to reject the lower courts' findings on this issue.

Third, the EEOC argues that it is inappropriate to accord "an equal measure of protection" (EEOC Br. 32) to all types of confidential tenure review documents. However, it is the EEOC's position that is susceptible to this charge, not petitioner's. In recognizing that internal decisionmakers, inside peer reviewers and outside peer reviewers stand in very different positions with respect to the tenure process, the EEOC in fact demonstrates why petitioner's proposed approach is sensible. What is called for is an individualized assessment of the value to the EEOC's investigation of each piece of confidential information. It is only the fact that the EEOC persuaded the Third Circuit to adopt a rule of unlimited disclosure that precluded the kind of individualized inquiry described by the EEOC.³

Confidentiality in Matters of Faculty Appointment, U. Chi. Rec. 165, 166 (May 22, 1979) ("Confidentiality . . . is . . . necessary for effective self-government of a university organized on a collegial basis"); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538, 1551 (1981).

³ If the Court accepts the University's argument that its tenure activities are protected by the First Amendment but is not convinced that the evidence of record allows it to reach any definitive conclusion on the issue of infringement, then the proper course would be to remand the matter to the district court for a trial on that issue. It would be manifestly improper to hold as a matter of law that there can be no infringement of the University's protected interests when there is an abundance of evidence to the contrary

Fourth, the EEOC argues that petitioner's concerns regarding the effect of EEOC subpoenas for confidential peer review documents are exaggerated. According to the EEOC, even if confidentiality is crucial to peer review—and thus to the decision “who may teach”—disclosure to the Commission will result in a “limited inroad on . . . confidentiality” because it is “unlawful for the Commission to make public any information that the Commission obtains in an investigation in advance of litigation.” EEOC Br. 33.

As the Commission concedes, however, the prohibition on “disclosure” is essentially meaningless because EEOC regulations allow disclosure of the confidential information to the charging party, to other government agencies and even to potential witnesses. 29 C.F.R. § 1601.22. It is pure speculation to believe that the confidentiality of such documents would be respected by the EEOC complainant, who is likely to feel injured and embittered by the very circumstances that give rise to the charge of discrimination. Moreover, even the limited disclosure of confidential peer review documents contemplated by the EEOC will have an adverse effect on “academicians’ willingness to provide candid and frank peer evaluations.” *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337 n.2 (7th Cir. 1983).

Fifth, the EEOC argues (Br. 34) that the likelihood of any particular evaluation being exposed is so small that there is no burden. In making this argument, the EEOC relies upon *Herbert v. Lando*, 441 U.S. 153, 174 (1979), *cert. denied*, 476 U.S. 1182 (1986) and *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972). But there is

on that issue. To do so would be particularly unfair in this case where the law of the Circuit at the time the issue was decided by the district court absolutely rejected the University's First Amendment claim. Accordingly, the University at a minimum should be given the opportunity to persuade a trier of fact that its interests are being infringed. Compare *City of Canton v. Harris*, 109 S.Ct. 1197 (1989).

no comparison between the practical impact of the Third Circuit's ruling that there is no privilege in this case and the holdings of this Court in *Herbert v. Lando*, and *Branzburg v. Hayes*. In *Herbert*, disclosure was appropriate only if the defendant could not show the truth of published statements, and in *Branzburg*, the issue was narrowed to evidence of crimes actually committed, which is a very limited burden.

In this case, by contrast, the Third Circuit routinely allows the EEOC automatic access to complete tenure files of all candidates who are arguably comparable to the charging party. Here, four of the five candidates whose files were demanded were from other departments and one was considered for tenure in a different year. In *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986), in response to a complaint by a white male French language teacher, claiming discrimination based on his French origin, the Third Circuit approved disclosure of all files for all candidates in every department of the entire College during a period from 1977-1985. Moreover, it is probably no coincidence that this case arises in the Third Circuit—the first circuit to announce a rule that the EEOC has unbridled access to confidential tenure materials. The very existence of such an absolute disclosure rule will encourage some persons to file charges simply to obtain embarrassing information about their former colleagues and will increase the nuisance value of even the most frivolous complaint. Thus, the likelihood that confidential information will be disclosed under the standard proposed by the EEOC and upheld by the Third Circuit is much greater than in either *Herbert* or *Branzburg*—certainly too great to hold as a matter of law that the subpoena power will have “no significant impact” upon academic freedom. *City of Akron*, 462 U.S. at 430.

Finally, the EEOC argues (Br. 34) that petitioner's First Amendment rights should be ignored because even

with a qualified privilege the EEOC will be able to obtain access to some documents in some instances. This argument is nothing more than a recognition that the qualified privilege suggested by petitioner should work properly. Petitioner anticipated this argument in its opening brief and there explained that "it is the routine disclosure of such materials that chills frank discussion and engenders disharmony." Pet. Br. 46 n.46. The EEOC does not dispute that argument, which was accepted by the Second Circuit in *Gray v. Board of Higher Ed.*, 692 F.2d 901, 908 (2d Cir. 1982). Instead, the EEOC ignores the contention and insists that the qualified privilege is a meaningless protection. In any case, colleges, universities and faculty members are better judges of the value of a qualified immunity in protecting their right to academic freedom than is the EEOC. See Br. of AAUP, 11-13; Br. of ACE, 15.

B. The EEOC places substantial reliance on the majority opinion in *Branzburg v. Hayes*, 408 U.S. at 690-691, which "[o]n the record . . . before i[t]," rejected the arguments of certain reporters that the governmental interest in "law enforcement and in ensuring effective grand jury proceedings is insufficient to override" the "uncertain" burden on newsgathering that "is said to result from insisting that reporters . . . respond to questions put to them in the course of a valid grand jury investigation or criminal trial." See EEOC Br. 23, 29, 31-36, 38-39. Justice Powell—who provided the crucial fifth vote to the majority—made clear in his concurring opinion that the majority's weighing of the particular interests in that case did not mean that reporters "are without constitutional rights" with respect to news gathering. *Branzburg*, 408 U.S. at 709. Rather, Justice Powell concluded that such an "asserted claim to privilege should be judged on its facts" *Id.* at 710. "The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* Justice Powell

made clear that, in his view, the broad privilege proposed by the reporters and the dissent would "defeat such a fair balancing" and "heavily subordinate" the state's interest.

Here, by contrast, it is the government that has taken an absolutist position that undermines any attempt to undertake a "fair balancing" of the competing interests on a case-by-case basis. Petitioner and its *amici* consistently have emphasized that they are asking only that their First Amendment interests be afforded *some* weight, explicitly recognizing that the EEOC will sometimes (and perhaps quite often) articulate an individualized basis for obtaining access to the documents that outweighs a university's interest in confidentiality. See Pet. Br. 14 (petitioner's interests entitled to *some* protection afforded by "balancing of the interests at stake on a case-by-case basis"); see also Pet. Br. 46-48; Br. of Amer. Council on Education, 22; Br. of AAUP, 14-15; Br. of Stanford, *et al.*, 11-13. Thus, *Branzburg* supports the constitutional analysis advocated by petitioner.⁴

C. With respect to petitioner's argument that confidential peer review materials are entitled to protection un-

⁴ The outcome in *Branzburg* also is attributable to the determination expressed in the majority's opinion that the underlying First Amendment value in the confidentiality afforded to the anonymous sources in that case was "frivolous." 408 U.S. at 691. The reporter's "estimates of the inhibiting effect of such subpoenas" on their newsgathering ability were found to be "to a great extent speculative." *Id.* at 693-694. The EEOC does not assert that the colleges' and universities' interest in the functioning of their peer-reviewed tenure process constitutes a frivolous First Amendment interest. Moreover, the record (and briefs of *amici curiae*) before the Court afford an ample basis to conclude that a rule mandating automatic disclosure of peer review evaluations has been demonstrated to have a detrimental effect on that process. This evidence alone significantly distinguishes this case from *Branzburg*, where the Court found no evidence concerning how the mere appearance of a reporter before a grand jury would interfere with the editorial process.

der a common law qualified privilege (Pet. Br. 21-31), the EEOC argues that there are no "sufficiently important interests" at stake to warrant recognition of a privilege in these circumstances. EEOC Br. 46-47; see *Trammel v. United States*, 445 U.S. 40, 51 (1980). But application of a qualified privilege is necessary to protect a university's interest in the existing peer-reviewed tenure process. See *supra* pp. 4-5. Given the central role of academic freedom in furthering the "robust exchange of ideas" (*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); Pet. Br. 15-17, 24-25), such an interest clearly would outweigh whatever limited effect the privilege might have on the EEOC's ability to perform its investigative function. Accordingly, the privilege should be recognized. See Pet. Br. 23-27.⁵

II. THIS COURT SHOULD CONSTRUE THE SUBPOENA ENFORCEMENT PROVISION OF TITLE VII NARROWLY TO AVOID CREATING A SUBSTANTIAL CONSTITUTIONAL QUESTION

The EEOC devotes a substantial portion of its brief (see EEOC Br. 9-24) to an issue that petitioner has conceded: that the "University is included within the organizations that Congress intended to cover when it amended Title VII in 1972." Pet. Br. 43. But the fact

⁵ The EEOC asserts that application of a qualified privilege would "seriously . . . hinder the Commission's investigations." EEOC Br. 48. At the same time, the Commission somewhat inconsistently argues that a qualified privilege would not guarantee confidentiality because it would not result in a great deal of material being withheld from the EEOC. EEOC Br. 34-35. Neither of these extreme positions is correct. In fact, the only burden imposed on the EEOC by a qualified privilege, or "balancing approach," is the burden of determining whether it in fact requires the confidential material in the individual case before it and of articulating a specific statement of need. See Pet. Br. 47-48. Such a standard would not result in production of all documents in all cases but simply would tailor any inroad on confidentiality to cases where it truly is required.

that Title VII was amended to encompass employment relationships at colleges and universities does not mean—as the Commission suggests (EEOC Br. 20)—that the EEOC's subpoena authority under Title VII must be interpreted in a manner that maximizes the intrusion into First Amendment interests. To the contrary, because the language of Title VII contains no "clear expression of Congress' intent" to extend the EEOC's subpoena enforcement authority in a manner that would give rise to substantial First Amendment concerns, the statute should be construed to recognize a qualified privilege and thereby avoid the constitutional question. *NLRB v. Catholic Bishop*, 440 U.S. at 507 (1979).

A. The EEOC argues that "it is not 'fairly possible' to read Title VII" in a way that recognizes a qualified privilege. EEOC Br. 24. Thus, the Commission, quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986), urges the Court not to "ignore the legislative will in order to avoid constitutional adjudication."

The Commission's reliance on *Schor* is misplaced; that case involved a situation where Congress' intent, reflected in the language of the statute as well as a House Report, precluded a reading of the statute that would have "avoided" the constitutional question.⁶ Here—as in *Catholic Bishop*, 440 U.S. 490, and *Public Citizen*, 109 S.Ct.

⁶ In *Schor*, the court of appeals had adopted a construction of the Commodities Exchange Act ("CEA") that limited the Commodity Futures Trading Commission's ("CFTC") authority to adjudicate counterclaims to those claims alleging violations of the CEA or regulations. The court had reasoned that such an interpretation was appropriate because a grant of authority to the CFTC to adjudicate state law counterclaims would give rise to Article III concerns. This Court reversed that holding, noting that such an interpretation was flatly inconsistent with "the face of the statute," and the plain language of the congressional committee reports. See 478 U.S. at 843 ("Counterclaims will be recognized [by the CFTC] on such terms and under such circumstances as the [CFTC] may prescribe by regulation") (quoting House Committee Report).

at 2572—there are no statements in the statute (or its legislative history) that preclude interpreting the EEOC's investigatory authority to recognize a qualified privilege. Although the Commission is certainly correct in its assertion that the Act's legislative history demonstrates that Congress intended to grant the EEOC jurisdiction over a university's faculty employment decisions (see EEOC Br. 12-13), there is no evidence that Congress considered the specific impact of that jurisdiction on EEOC discovery of confidential peer review documents. Thus, Congress' proven determination to include colleges and universities within the coverage of Title VII says nothing about Congress' intent with respect to recognition of an evidentiary privilege, based on First Amendment or common law principles, in that context. It remains "fairly possible" to construe the EEOC's discovery authority to recognize such a privilege. See Pet. Br. 38-43.

B. For similar reasons, the EEOC is incorrect in its assertion that Title VII and its legislative history reflect an "affirmative intention of the Congress clearly expressed" to permit the EEOC to intrude, at will, into the most confidential, First-Amendment protected files of the university. EEOC Br. 24 (*quoting Catholic Bishop*, 440 U.S. at 500). The legislative history cited by the Commission to support this finding of "affirmative intention" consists of opponents of the 1972 Higher Education Amendments objecting to the *substantive* issue of extending the Act's coverage to colleges and universities. EEOC Br. 12-13. But, there is not a word on the *procedural* question of how broadly the EEOC's subpoena authority should be interpreted in light of that substantive coverage. In sum, there is no clear statement of Congress' intent to extend the EEOC's subpoena authority into the constitutionally protected tenure review process. In the absence of such a clear statement, the court below erred in *presuming* congressional intention "to press ahead into dangerous constitutional thickets" *Public Citizen*, 109 S.Ct. at 2572.

C. Ultimately, the EEOC's own brief demonstrates that the EEOC's suggestion that its subpoenas should be limited only by a "relevance" standard proves too much. See EEOC Br. 22 ("Title VII forecloses any unwritten exceptions based upon 'interests in confidentiality'"). Under that standard the University could be ordered to reveal matters clearly protected by the attorney-client privilege and every other established privilege. Such information might well provide probative evidence of wrongdoing; nevertheless, disclosure of such privileged communications is not required simply because the EEOC thinks it might be broadly relevant to its investigation.

Indeed, the Commission is compelled to disavow its own argument. (EEOC Br. 23). After contending at length that Title VII's enforcement scheme necessarily shows that Congress intended to grant the Commission completely unbridled access to all documents relevant to a claim, the EEOC acknowledges that, of course, Title VII does not purport to override other privileges.⁷ But, the Commission argues that only "*established and generally applicable privileges*" are exempted under this procedure. Of course, there is no more evidence in the structure or

⁷ There is no basis for the Commission's assertion that the prohibition in Section 709(e) against the public disclosure by EEOC employees of any information obtained during an investigation constitutes Congress' solution to the confidentiality problem. That section is not aimed at confidential information; it prohibits disclosure of all information. The most that section does is encourage cooperation by employers by providing them with a measure of protection against disclosure of any information they provide to the EEOC (whether that information is protected by a privilege or not). Moreover, the EEOC's argument again proves too much. If Congress intended Section 709(e) to solve the problem of dealing with confidential information, then the attorney-client privilege and all other privileges based on the confidential nature of the information would be unavailing in the face of the EEOC's unlimited subpoena authority. The suggestion is plainly absurd on its face and inconsistent with all prior decisions on the issue. See Pet. Br. 40 (and cases cited therein).

language of Title VII to support an exemption for "established and generally applicable privileges"—which the EEOC accepts without question—than there is to support the University's claim of exemption for all evidentiary privileges. The point is that Congress did not intend for Title VII investigations to proceed without regard to legitimate claims of privilege.

III. A RULE REQUIRING DISCLOSURE UPON DEMAND OF CONFIDENTIAL PEER REVIEW MATERIALS IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST AND IS ACCORDINGLY UNCONSTITUTIONAL

If petitioner is correct that the expansive subpoena authority asserted by the EEOC infringes academic freedom, but the Court declines to construe Title VII narrowly, then the only question is whether the EEOC's practice of issuing blanket subpoenas for confidential tenure review documents of the complainant (and "similarly situated" persons) is a "narrowly tailored" means of furthering EEOC's concededly compelling governmental interest.⁸

A. What is striking about the EEOC's analysis of its asserted need for confidential tenure review information is the complete absence of any effort to show why that information is needed in any specific case, including this one.⁹ The University argued in its opening brief that it

⁸ The Commission formulates the standard somewhat differently, stating that there must be a "substantial relation" between the governmental action and an "overriding and compelling state interest." EEOC Br. 36. At bottom, this statement of the constitutional standard does not differ in substance from the more common standard articulated by petitioner, and the EEOC does not argue that the formulation used by petitioner is improper.

⁹ Although the EEOC repeatedly asserts that recognition of a privilege for confidential peer review files in tenure cases will "cripple" its enforcement efforts, the Commission makes no attempt to support that claim. Even though the Commission undoubt-

would be an extraordinary case where no evidence of discrimination existed except in the confidential files. The EEOC proves that point by citing Ms. Tung's charge of sexual harassment. Nothing relevant to that charge will appear in the confidential peer review documents. Evidence, if any exists, to support that claim appears elsewhere. But the EEOC makes no effort to determine whether the claim has any real basis or whether it has any real need for the documents in question. Instead, it simply insists that the tenure review process must be jeopardized before the EEOC considers the merits of the claim or its need for the documents.

Under the analysis proposed by the University, if the EEOC could make a showing that there was some basis for believing that the Chairman of the Department had sexually harassed Ms. Tung and that the confidential peer review documents might support that claim, then there would be reason to permit access at least to some of the confidential materials. There would be an individualized showing of need. In effect, the EEOC has conceded that it could fulfill its responsibilities in this case if it would do more than sit back and insist that all confidential documents must be brought to it before it makes any effort to investigate anything else about a charge.

As petitioner has previously noted, the EEOC has been denied automatic access to peer review documents for most of this decade in both the Seventh and Second Circuits. Yet, the EEOC has made no effort to respond to the Uni-

edly keeps records on such matters, it does not indicate 1) how many investigations involve tenure matters, 2) how many involved institutions in the Second or Seventh Circuits, 3) whether the refusal of any of those schools to provide "unencumbered access" (EEOC Br. 16; emphasis added) has hampered the Commission's efforts to investigate claims, conciliate them or litigate them. If we are correct that the documents requested are protected by the First Amendment, then the EEOC has the burden to demonstrate, not merely assert, that the infringement is necessary to further its compelling interest. It has not made that showing in this or in any other court.

versity's pointed challenge to explain why it is that if the EEOC *requires* confidential peer review information in order to perform its enforcement responsibilities, it has not sought to have this issue litigated in this Court. Indeed, the EEOC opposed certiorari in this case. The EEOC's litigating posture on this issue speaks much more clearly about its enforcement responsibilities than does its self-serving assertion that it must have these documents.

B. In an attempt to bolster its argument regarding the "need" for blanket access, the EEOC emphasizes the "weight" that should be accorded to the complaint, stating that "a *sworn charge* of sexual harassment and resulting retaliation by the complainant's Department Chairman cannot be denigrated as meaningless." EEOC Br. 17 n.17 (emphasis added); see EEOC Br. 36-37. In fact, the "sworn charge" of retaliation, which alleged, *inter alia*, that the University had "bugged" Professor Tung's telephone, was summarily dismissed by the EEOC, demonstrating that, at least in some cases, the EEOC itself places no independent weight on such charges. See EEOC Determination of Charge (No. 031860528) (June 6, 1989).¹⁰

The EEOC also makes the remarkable assertion that "the Commission has carefully explained why it needs the materials that have been withheld," thereby suggesting that any showing of "need" has been met. EEOC Br. 41. That is simply not the case; if the EEOC were willing to make a showing of "need" before demanding access to confidential tenure files, the University would not be litigating this case. In fact, the EEOC consistently has adopted the position that it is not required to undertake any explanation or showing of need before insisting upon access to university files. According to the EEOC, "relevancy," broadly defined, is the *only* limit on its subpoena power.

¹⁰ Copies of this determination letter have been lodged with the Clerk of this Court and served upon the Solicitor General.

C. At bottom, despite the clear legitimacy of the EEOC's overall mandate to halt invidious discrimination in employment, it is not an undue burden to require the agency to undertake a review of non-confidential materials before insisting on blanket discovery of confidential documents in a way that will undermine the peer-reviewed tenure process.¹¹ To insist that the EEOC determine whether it has a specific reason for requesting all of these documents before it insists upon their disclosure is a measured response which imposes only a minimal burden on the EEOC.

If, in fact, the EEOC intends to review the non-confidential documents at some time (and it surely must or it would not request them), then the only "burden" is one of timing. Petitioner simply asks that the EEOC review those documents before pressing for confidential peer-review material so that the EEOC can determine whether there is any reason to believe that the confidential materials will advance the investigation.

Contrary to the EEOC's claim (Br. 19), recognition of the University's First Amendment protected privilege against disclosure of confidential tenure files will not alter the EEOC's enforcement responsibilities vis-a-vis universities. It still will conduct investigations, conciliate cases and bring actions against universities when necessary, just as it has in Illinois, Indiana, Wisconsin, Connecticut, Vermont and New York where a privilege has been recognized by the circuit courts for the past eight years. Thus, the EEOC grossly distorts the University's position when it describes it as seeking a "qual-

¹¹ The EEOC's recurring focus on the statute, regulations and "normal operating procedures" of the EEOC ignores this Court's admonition that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980) (citations omitted); see Pet. Br. 36-37.

ified immunity." EEOC Br. 24. The University recognizes its obligation fully to comply with Title VII and seeks no immunity, qualified or otherwise, from the mandate of that statute.¹²

In any case, the question of the EEOC's "need" for such materials in this or any other particular case should not be a particularly weighty consideration in resolving the question presented. If in fact, the EEOC's need is both great and obvious, then any dispute over production will be readily resolved in the Commission's favor. Petitioner never has suggested that the privilege be absolute or even that the threshold for production be very high. See Pet. Br. pp. 46-47. The absolutist is the EEOC. It has always demanded the broadest production of documents with no consideration of the competing constitutional and common law concerns. Thus, regardless of how the balance ultimately is resolved in any specific case, including this one (and that clearly is a question for the lower courts, at least in the first instance), the unyielding position taken by the EEOC can in no way be regarded as "narrowly tailored."

¹² The EEOC equates the University's claim that its special tenure process is entitled to respect by the EEOC with an assertion that the University should be exempt from Title VII. But the University's argument is no different than a law firm's would be if it were charged by the EEOC with employment discrimination against an attorney. The law firm properly would ask the court to take into account the fact that some of the relevant evidence might be protected by an attorney-client privilege. Or similarly, if a hospital is charged with employment discrimination against a health care provider, it is very likely that an issue of the confidentiality of patient records would arise. No one would argue that, by raising those issues, the respondents there seek any immunity. In those situations, as here, the respondents merely seek to have the normal investigatory and enforcement mechanisms of the EEOC applied in a way that recognizes the existence of and the need to protect confidential information from casual scrutiny by the government.

CONCLUSION

For the foregoing reasons and those stated in the Brief of Petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

SHELLEY Z. GREEN
NEIL J. HAMBURG
Office of the General Counsel
University of Pennsylvania
110 College Hall
Philadelphia, PA 19104
(215) 898-7660

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
LOREEN M. MARCIL
JULI E. FARRIS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner

September 13, 1989

* Counsel of Record

AMICUS CURIAE

BRIEF

10
No. 88-493

Supreme Court, U.S.
FILED

JUN 16 1989

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**BRIEF OF THE AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS, AMICUS CURIAE,
NON-ALIGNED**

WILLIAM W. VAN ALSTYNE *
DUKE UNIVERSITY SCHOOL OF LAW
Durham, North Carolina 27706
(919) 684-2219

ANN H. FRANKE
MARTHA A. TOLL
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

*Counsel for the American
Association of University
Professors*

June 20, 1989

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
An Administrative Subpoena Infringing on Constitutionally Protected Interests May Not Be Enforced Under An Unqualified Standard of Investigatory Relevance	
CONCLUSION	15
APPENDIX A:	
AAUP Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments	
	1a
APPENDIX B:	
Duke University Report of the Provost's Committee on Academic Policy and Faculty Review.....	
	4a
University of Chicago Report of the Committee on Confidentiality in Matters of Faculty Appointment	
	11a

TABLE OF AUTHORITIES

CASES:	Page
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	12
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	2
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	9
<i>Brown v. Socialist Workers '74 Campaign Committee</i> , 459 U.S. 87 (1982)	9
<i>Cohen v. Board of Trustees</i> , 867 F.2d 1455 (3rd Cir. 1989)	2
<i>Delaware State College v. Ricks</i> , 449 U.S. 250 (1980)	2
<i>Diannan, In re</i> , 661 F.2d 426 (5th Cir. 1981), cert. denied 457 U.S. 1106 (1982)	8
<i>EEOC v. Associated Dry Goods Corp.</i> , 449 U.S. 590 (1981)	9
<i>EEOC v. Franklin and Marshall College</i> , 775 F.2d 110 (3rd Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	passim
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	passim
<i>Gibson v. Florida Legislative Investigating Committee</i> , 372 U.S. 539 (1963)	8
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	passim
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	8, 12, 14
<i>Krotkoff v. Goucher College</i> , 585 F.2d 675 (4th Cir. 1978)	2
<i>Marshall v. Barlow's Inc.</i> , 436 U.S. 307 (1978)	9
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	9
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975)	12
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	10
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	10
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	12
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	passim
<i>Talley v. California</i> , 362 U.S. 60 (1960)	9

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	9, 12, 13
<i>University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	10
<i>University of Pennsylvania v. EEOC</i> , 850 F.2d 969 (3rd Cir. 1988)	passim
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	11, 14
<i>Yellin v. United States</i> , 374 U.S. 109 (1963)	8

STATUTE AND RULE:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e	passim
Rule 26(c), Federal Rules of Civil Procedure	8

OTHER AUTHORITIES:

Administrative Conference of the United States, Recommendation 84-3, reported at 51 U.S.L.W. 2046 (7/24/84)	13
AAUP POLICY DOCUMENTS AND REPORTS (1984):	
(1984):	
1940 <i>Statement of Principles on Academic Freedom and Tenure</i>	2
1966 <i>Joint Statement on Government of Colleges and Universities</i>	3
1971 <i>Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments</i>	2
1973 <i>Report on Affirmative Action in Higher Education</i>	3
1976 <i>Statement on Discrimination</i>	3
AAUP <i>Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments</i>	1a
Lockart, et al., CONSTITUTIONAL LAW (6th ed. 1986)	9
Rehnquist, W., "Sunshine in the Third Branch," 16 WASHBURN L. REV. 559 (1977)	13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

**BRIEF OF THE AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*,
NON-ALIGNED**

The American Association of University Professors files this non-aligned brief *amicus curiae* with the consent of both parties.

INTEREST OF THE AMICUS

The American Association of University Professors ("AAUP" or "Association") is a national membership organization of 40,000 faculty members and research scholars in all the academic disciplines. Founded in 1915, it is the nation's oldest and largest body dedicated to the advancement of academic freedom in higher education.

One of AAUP's principal tasks, often undertaken in collaboration with other higher education organizations, is the formulation of national standards for the academic community. AAUP policy statements address the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, the elimination of discrimination, and many other facets of academic life.¹ State and federal courts throughout the country, including this Court, have frequently referred to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their students.²

AAUP has long been concerned with the integrity of procedures for the award of tenure and the renewal of probationary faculty appointments. It has promulgated policy statements on these matters which serve as models for the academic community.³ An essential ingredient in

¹ The major AAUP policy statements are compiled in AAUP POLICY DOCUMENTS AND REPORTS (1984), a copy of which is in the collection of the Supreme Court library. The AAUP statements referred to herein may be found in this volume unless otherwise referenced.

² E.g., *Delaware State College v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

³ The seminal 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by AAUP and the Association of American Colleges, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). See also *Cohen v. Board of Trustees*, 867 F.2d 1455, 1469 (3rd Cir. 1989) (en banc). Over one hundred educational organizations and learned societies have endorsed the 1940 *Statement*. In 1971 the Association adopted the derivative *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* setting forth procedures to safeguard against decisions adversely affecting a faculty member that would be violative of academic freedom, impermissibly discriminatory, or based on insufficient consideration. See *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1971).

procedures concerning faculty appointments and tenure is the exercise of judgment by senior faculty assessing the scholarly contributions and potential of individual faculty members. The 1966 *Joint Statement on Government of Colleges and Universities*, formulated by AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, states that the faculty has the primary role in making decisions about the status of faculty appointments. Full candor and cooperation are essential to the process, and faculty members rely on the strong tradition of confidentiality protecting this exchange of professional opinion.⁴

Commensurate with the Association's concern about procedures for faculty evaluation is its historic commitment to the elimination of discrimination based on national origin, race, sex, and other factors not directly relevant to professional performance.⁵ The declared interests of AAUP thus embrace both the candidate for tenure and the faculty members charged with primary responsibility for evaluation of the candidate. The Association examined these respective interests in 1980 and set forth its accommodation of the competing concerns in its *Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, reprinted as Appendix A. AAUP is well qualified to address the Court as *amicus curiae* in a non-aligned stance.⁶

⁴ Reports from Duke University and the University of Chicago discussing the role of confidentiality in the peer review process are excerpted in Appendix B.

⁵ See AAUP's 1976 *Statement on Discrimination*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* n.1, at p. 73; 1973 *Report on Affirmative Action in Higher Education*, *id.*, at p. 82.

⁶ AAUP takes no position at present on whether the University of Pennsylvania should be compelled to disclose the confidential peer review materials sought by the EEOC, challenging here only the legal standard applied by the lower courts. We note, at the same time, that Professor Tung's Charge of Discrimination and Amended

SUMMARY OF ARGUMENT

After properly concluding that the University of Pennsylvania's first amendment objection to the EEOC subpoena for university files had been raised in a timely fashion, the Third Circuit panel then made that ruling moot. It at once applied a prior divided panel decision issued within the same circuit effectively holding that the first amendment provided no ground to resist an EEOC investigatory subpoena so long as it sought materials of plausible investigatory relevance, regardless of the thinness of reason to believe the tenure process had gone awry, or the stated reasons accompanying the university's request for protection of its files. In its ruling, the court declined to direct the district court to balance the EEOC's production demand against the university's concerns at all. We argue here that that decision is seriously inconsistent with this Court's own first amendment holdings applicable to this case as to any other. Accordingly, we urge that the decision be reversed.

Whether framed as a "qualified privilege" as the Seventh Circuit has described it, or more simply as a first amendment "balancing" requirement as the Second Circuit had held, a university's efforts to secure the first amendment protection of tenure files may not be disregarded by mere investigatory preference of the EEOC. When, as here, the EEOC has set a fixed policy to decline to take any first amendment protection of tenure files into account in framing its demands for the production of files, it becomes incumbent on the federal district court through which the EEOC seeks enforcement not

Charge of Discrimination allege that she received no notification of the reason for the denial of tenure. Joint Appendix at 24, 28. The University contends that Professor Tung was advised of the reasons for the decision. Resolution of this factual dispute would be relevant to the application of the legal standard urged by AAUP. See *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982).

ministerially to direct compliance, but, rather, to examine the investigatory predicate of the EEOC subpoena, to determine the justificatory basis of that subpoena, and to tailor discovery accordingly, i.e., with due regard to the university's timely constitutional objections.

Beginning not later than 1952, this Court acknowledged that the functions of universities in our national life cannot be fulfilled without first and fourteenth amendment protection of their academic freedom. The single most consistent and most rigorous application of this Court's academic freedom decisions, moreover, has related directly to investigative claims pressed by government itself. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). The EEOC is not exempt from these decisions, nor is there any sound reason why it should be. Rather, as Chief Judge Aldisert noted in dissent from the original Third Circuit panel decision, "the court should . . . engage in a balancing analysis," according the university's first amendment interests due weight here as in any other case.

Constitutionally, we will argue, the general first amendment imperative is no different here than in those cases reviewed by this Court three decades ago in which academic freedom was threatened by the disposition of state and national legislative investigating committees. At that time, this Court properly responded not by granting universities any carte blanche immunity from accountability, but by recognizing that they cannot function without reasonable first amendment protection from peremptory government demands. The decisions of this Court reflect the insight that unregulated investigation threatens academic freedom and operates destructively like Gresham's law. Indeed, if not regulated, it can cause its own kind of institutional mediocrity and institutional paralysis, disabling institutions in being able to rely upon sound professional practices, including peer group review.

The Third Circuit expressly declined to pay heed. In the instant case it said, referring to *Franklin and Mar-*

shall, that "this court expressly decline[s] to limit the EEOC's subpoena authority to accommodate an academic institution's constitutional right to academic freedom." In *Franklin and Marshall*, it put its position just as chillingly: "The United States Court of Appeals for the Seventh Circuit has recognized a qualified privilege requiring particularized need before ordering disclosure of the names and identities of persons responsible for material generated in a peer review tenure process. . . . The United States Court of Appeals for the Second Circuit adopted a balancing approach. . . . We decline to follow the Seventh and Second Circuits in recognizing *either* a qualified privilege *or* a balancing approach." 775 F.2d at 113-14 (emphasis added). Accordingly, it will do neither—unless this Court so requires. The short of it is that in the Third Circuit, "nothing" is the answer that that court provides to the question of what district courts are expected to do to accommodate what the court itself says to be important to an academic institution's constitutional right to academic freedom.

As *amicus curiae*, we are unable to see any basis for the Third Circuit's hostile rejection of the Second and Seventh Circuit positions which we believe fully accord with the decisions of this Court, even as Judge Aldisert, in dissent in *Franklin and Marshall*, observed. Whether, following remand, some or all of what the EEOC originally sought might still be forthcoming if particularized need can be shown based on a sufficient predicate, does not now concern us. What concerns us as *amicus* is the Third Circuit's categorical rejectionist response to the University of Pennsylvania's basic first amendment claim.

Beyond the disposition of reversal and remand, we argue merely that the more rigorous inquiry, as reflected in Chief Judge Aldisert's dissenting opinion in *Franklin and Marshall*, the Seventh Circuit's opinion in *EEOC v. University of Notre Dame du Lac*, or the Second Circuit opinion in *Gray v. Board of Higher Education*, be recognized and applied. Each was, in our view, consistent with

a reasonable regard for institutional imperatives in safeguarding the integrity of peer review processes and with the first amendment. The Third Circuit categorical position, in contrast, is consistent with neither. We come to the same point, still again. It is critical to the ability of universities to perform appropriately and lawfully that the Third Circuit decision be reversed, and that this case be sent back to the district court.

ARGUMENT

An Administrative Subpoena Infringing on Constitutionally Protected Interests May Not Be Enforced Under an Unqualified Standard of Investigatory Relevance.

When reduced to its essence, the holding of the court below offers quite a startling proposition, that a constitutional right in no way limits the subpoena authority of a government agency. Considering itself bound by the earlier split panel decision in *Franklin and Marshall College*, the lower court panel here flatly declared "[t]hus, in *Franklin and Marshall*, this court *expressly declined* to limit the EEOC's subpoena authority to accommodate an academic institution's *constitutional right to 'academic freedom.'*" *University of Pennsylvania v. EEOC*, 850 F.2d 969, 975 (3rd Cir. 1988) (emphasis added). The EEOC states the proposition as starkly, giving no quarter to how harshly its processes may impact on the institutions it touches—the district court is not to take such a consequence into account. The EEOC's brief filed in opposition to the Petition for Writ of Certiorari in this case makes this claim quite categorically and altogether sweepingly. It denies that district courts have authority to police the scope of EEOC subpoenas submitted for enforcement even by such minimum standards the courts are expected to apply in private suits—to consider the scope of what is sought and to tailor discovery to the circumstances of a particular case, taking a large range of matters into account. The EEOC declared, "[i]n private civil discovery, *by contrast*, courts

do have authority, under Fed. R. Civ. P. 26(c), to issue orders to protect parties from annoyance, embarrassment, oppression, or undue burden or expense and to tailor discovery to the circumstances of a particular case." Respondent's Brief in Opposition to the Petition for Writ of Certiorari at pp. 6-8 (emphasis added).

On the same asserted claim of special authority as an unencumbered statutory agency (i.e., distinguishing itself from private parties), the EEOC sought similarly to claim irrelevance of two significant federal circuit court decisions it acknowledged as perhaps properly directing district courts to take due account of the potential adverse effects of untailored discovery. *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983); *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982). These cases, the EEOC suggests, may be appropriate applications of judicial responsibility under Rule 26(c) of the Federal Rules of Civil Procedure respecting discovery demands by private parties, even in its view; however, it asserts, the EEOC is not subject to any such protective superintendence in respect to the scope of its subpoenas. We believe this is a proposition this Court cannot and should not accept. Identical concerns ought to be treated identically in these matters. Indeed, history suggests that any asymmetry in the concerns weighs in favor of greater supervision of government subpoenas, as it is from investigative forays by the government itself that the more severe threats to academic freedom have arisen.⁷ The distinc-

⁷ E.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963); *Yellin v. United States*, 374 U.S. 109 (1963); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *In re Dinnan*, 661 F.2d 426, 430 (5th Cir. 1981), cert. denied 457 U.S. 1106 (1982) ("Quite bluntly, this Court feels that the government should stay out of academic affairs. However, these issues are not presented in the instant case. Here a private plaintiff is attempting to enforce her constitutional and statutory rights in an employment situation") (emphasis in original). See

tion claimed is additionally unpersuasive, moreover, since the EEOC may, if it chooses, act as mere discovery surrogate for the private party. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 607 (1981) (unilateral prelitigation disclosure by EEOC of anything it may secure by subpoena in relation to a party's case is permitted to that party, despite apparent statutory restriction) (Stevens, J., dissenting).

The principle that investigatory demands must be evaluated in light of constitutional considerations is not at all novel in this Court. In the case of the executive branch, such demands have been recognized as circumscribed by article II. See *United States v. Nixon*, 418 U.S. 683 (1974). Equivalently, in the case of political and educational organizations, this Court has similarly also required a special showing—of foundation, need, and suitable protective measures from intimidating disclosure—under first amendment considerations, in disallowing discovery demands that threaten the capacity of persons to maintain meaningful associations as well as to conduct their professional work. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 876 (1982); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring, identifying a reporter's confidential source as provisionally protected by the first amendment: "The balance of these vital constitutional and societal interests [should be struck] on a case-by-case basis with the tried and traditional way of adjudicating such questions").⁸

also *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (striking down warrantless inspection of employer's premises pursuant to administrative subpoena).

⁸ See Lockart, Kamisar, Choper, & Shiffrin, *CONSTITUTIONAL LAW* 999 (6th ed. 1986) ("The majority of courts applying *Branzburg* have concluded that Powell, J.'s, opinion read together with the dissents affords the basis for a qualified privilege.")

The seminal case is unquestionably that of *Sweezy v. New Hampshire*, *supra*. Justice Frankfurter's concurring opinion, in particular, has endured in decisions of this Court.⁹ At issue specifically in *Sweezy* was a state investigation of its own, state-funded university and a refusal by a lecturer at the University of New Hampshire to answer quite specific questions on the content of what he had taught on particular occasions. The majority in *Sweezy* reversed the contempt conviction, which the state supreme court had affirmed on a determination that the questions were logically relevant to the subject under investigation, relying on a due process basis respecting the uncertain scope of the investigating officer's authority.¹⁰ Concurring for himself and Justice Harlan,

⁹ *E.g.*, *University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265, 318 (1978) (Powell, J., concurring). In *Ewing*, citing *Sweezy* three times, Justice Stevens suggested in his opinion for the Court that: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." Justice Stevens' observation has been employed by some commentators to suggest that there is a difference between two kinds of academic freedom (namely, individual academic freedom and institutional academic freedom), and that the two may sometimes be on a direct collision course. We find no such tension here between institutional academic freedom and professional academic freedom interests; rather they are aligned. This is not an instance where the institution has designated some superseding mission or ideology (religious or otherwise) to which it seeks to subordinate "lehrfreiheit" or "lernfreiheit." It is, rather, an instance of an institution committing the primary responsibility of selecting candidates for tenured faculty positions to those engaged professionally in critical, academic work. We believe this policy by the institution fully deserves first amendment respect. This Court has, in its *Yeshiva* decision, separately recognized the significance of this shared governance tradition in senior universities in the United States. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

¹⁰ It is, at the same time, clear from Chief Justice Warren's opinion for the Court that the due process issue was influenced by

Justice Frankfurter disagreed with the majority regarding the sufficiency of the investigating officer's authority, but concluded that the questions were overly demanding, with insufficient probable cause, *in light of the chilling impact of requiring answers under the circumstances and the impact upon first amendment institutional concerns*: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification [as the state provided in the particular case] appears grossly inadequate." 354 U.S. at 261. There then follows the oft-quoted passage from Justice Frankfurter's opinion:

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. . . . "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Id. at 262-63. The position of the EEOC and Third Circuit panel in this case is strikingly indistinguishable for all practical purposes from the rejected state supreme court's treatment in *Sweezy* that mere relevance suffices to overcome these interests.

Justice Frankfurter's opinion requiring a balancing, derived from the first amendment, in all cases directly affecting academic freedom in American universities is an extension of his concurring opinion in 1952 in *Wie-*

first amendment academic freedom considerations as well. See, *e.g.*, 354 U.S. at 250 ("We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression. . . .").

man v. Updegraff. "The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power." 344 U.S. 183, 198 (1952) (emphasis added). The AAUP entirely agrees. "These limitations" are, foundationally, first amendment limitations. The dependence of universities on a protected measure of peer review material, and their ability to secure proper tenure decisions based on full, candid, professional assessments of academic worth and professional substance, are directly involved here. Neither the EEOC nor the district court may simply disregard them. Rather, fully as much as was reflected in *Sweezy*, they must be given very substantial weight. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960).

The institutional ability of a university to secure a judicially protected measure of control over the privacy of tenure files is fully as important as Paul Sweezy's academic freedom interests in declining to review what he taught in a particular class on a particular day. That erosion of confidentiality may impair the quality of decisional processes is not a truism unique to higher education. As this court observed in *NLRB v. Sears, Roebuck & Co.*, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process." 421 U.S. 132, 151 (1975). The reference was drawn from the previous Term's decision in *United States v. Nixon*, *supra*, in which the Court further observed "to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." 418 U.S. at 711. The adverse impact of disclosure on the effectiveness of decisional processes has also been examined with respect to this Court's own conferences and to the func-

tioning of multi-member federal agencies.¹¹ The court below harbored no illusions that the university's decisional process would remain undisturbed by its ruling. Citing the earlier *Franklin and Marshall* case, the Court indicated, "[m]oreover, we acknowledged that the EEOC's position *would* burden the tenure review process and would impact on academic freedom, which is 'a special concern of the First Amendment.'" 850 F.2d at 974 (citations omitted and emphasis added).

Article III courts are bound to consider the impact of EEOC investigatory demands *before* undertaking to enforce its subpoenas under threat of contempt sanctions against university officers or faculty who act to shield the confidentiality of tenure review materials. Absent good reason (i.e., some articulable basis) to believe the tenure process went awry, for instance, or absent good reason to believe the redacted or withheld material is withheld from motives of concealment of improper considerations tainting the tenure review process,¹² the institution may not, consistent with amendment, be subjected to contempt proceedings for seeking to insure the viability of its decisional process in a manner neither

¹¹ W. Rehnquist, "Sunshine in the Third Branch," 16 WASHBURN L. REV. 559 (1977) (addressing hypothetically whether the Court's deliberations ought to be open to the public). The Administrative Conference of the United States has noted the adverse effects on collegiality in multi-member federal agencies as a consequence of open meeting requirements. Recommendation 84-3, "Improvements in the Administration of the Government in the Sunshine Act," adopted June 28, 1984, reported at 51 U.S.L.W. 2046 (7/24/84). Appendix B excerpts reports from the University of Chicago and Duke University on the integrity of decisional processes.

¹² When there is such a belief asserted in good faith, an in camera review by the district court may provisionally be a reasonable and fair means of finding out. Cf. *United States v. Nixon*, 418 U.S. 683 (1973) (in camera examination authorized). For an additional elaboration of appropriate considerations and procedures, see *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331, 338-340 (1983).

feigned nor in any way at odds with a scrupulous regard for Title VII.

The Second Circuit and Seventh Circuit decisions (as well as Chief Judge Aldisert's dissenting position in *Franklin & Marshall*), understood and applied these considerations appropriately and conscientiously. Though not of a piece, each was nevertheless in keeping with this Court's decisions originating with *Wiemann v. Updegraff*, carried forward by this Court in *Sweezy* and in *Keyishian*, and implicit in *Bakke* and *Ewing*, as well. In contrast, respectfully, the position of the Third Circuit panel in this case (and in *Franklin & Marshall*) is fundamentally inconsistent with the first amendment decisions of this Court in ignoring every suggestion either by Chief Judge Aldisert or by the Second and Seventh Circuits.¹³ In expressly declining to weigh any interests of the university, consistent with this Court's position in cases such as *Sweezy*, the Third Circuit set its position contrary to thirty years of sensitive case law in this Court.

¹³ Additionally, in the same way the court also ignored its obligation to interpret statutes (i.e., the agency discovery sections of Title VII) to avoid constitutional conflicts as it might easily have done as urged by the University of Pennsylvania, and as reflected in both *Gray* and *University of Notre Dame du Lac*.

CONCLUSION

From its stance as a non-aligned *amicus curiae*, AAUP urges the reversal of the decision below and the remand of this case for reconsideration in light of a standard consistent with the first amendment.

WILLIAM W. VAN ALSTYNE *
DUKE UNIVERSITY SCHOOL OF LAW
Durham, North Carolina 27706
(919) 684-2219

ANN H. FRANKE
MARTHA A. TOLL
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

*Counsel for the American
Association of University
Professors*

* Counsel of Record

June 20, 1989

APPENDICES

APPENDIX A

AAUP's Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faulty Appointments

The following statement, approved by Committee A and adopted by the Council at their meetings in November, 1980, addresses the issue posed in seeking disclosure of faculty members' positions in a discrimination complaint. These issues have gained national attention in recent months as a result of the imprisonment of Professor James Dinnan of the University of Georgia after he refused to comply with a judicial order to divulge his vote on the tenure candidacy of Professor Maija Blau-bergs.

A dramatic episode arising at the University of Georgia presents complex and difficult questions. What follows expresses no judgment about the facts or the merits of that case, as to which we believe the academic community to be insufficiently informed.

We believe that the harsh action of imprisonment, which we deplore, has overshadowed the underlying issues: first, the necessity of proper procedures for rectifying discrimination; second, the proper scope of judicial compulsion in such cases, to which this statement is principally addressed.

Faculty members have the right to decisions on the renewal of their appointments free of impermissible considerations, such as considerations violative of academic freedom or prejudice with respect to race, sex, religion, or national origin. This Association has buttressed this principle by concluding that, in the event of an adverse decision on renewal, the faculty member should be advised of the reasons which contributed to that decision, have an opportunity to request a reconsideration by the decision-making body, and have available a standing hearing committee to entertain any complaint that an impermissible consideration played a role in the decision.

Moreover, in the context of such proceedings the Association has recognized that in appropriate circumstances the participants in the decision-making process may permissibly be called upon to account for their actions.

At the same time, institutions ought to be free from impermissible external intrusions of constraints in making nonrenewal decisions. This freedom is claimed not only as a matter of prudence, resting upon the higher competence of those engaged in the enterprise to select their peers and the chilling effect upon that exercise of judgment engendered by external constraints, but as a matter of principle: individuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance. Therefore, when litigation involves judicially compelled disclosure of the actions and motivations of the faculty participants in the nonrenewal process, the courts should recognize the value of maintaining institutional integrity.

We believe it inappropriate for a court to compel disclosure of the actions and motivations of the individual participants in a nonrenewal decision without first weighing the facts and circumstances asserted by the complainant. A judgment must then follow that those facts and circumstances raise a sufficient inference that some impermissible consideration was likely to have played a role to overcome the presumption in favor of the integrity of the academic process. That is, the inference must be sufficiently strong to defeat the claim, albeit a qualified one, that faculty members may properly assert to a degree of privilege that shields their actions and thought processes from judicial inquiry. Among the factors that a court may properly weigh in making that determination are the adequacy of the procedures employed in the nonrenewal decision, the adequacy of the reasons offered in defense of the decision, the adequacy of the review procedures internal to the institution, statistical evidence

that might give rise to an inference of discrimination, factual assertions of statements or incidents that indicate personal bias or prejudices on the part of the participants, the availability of the information sought from other sources, and the importance of the information sought to the issues presented.

We reiterate, however, that this statement of general principle does not represent a judgment on whether or not a proper weighing of these factors occurred in the particular case that gave rise to our concern.

APPENDIX B

We excerpt below reports from Duke University and the University of Chicago on the need for confidentiality in matters related to faculty appointments and reappointments and on the consequences attendant to substantial erosion of the long-standing tradition of confidentiality.

Duke University

March 10, 1988

Dr. Phillip A. Griffiths
Provost
220 Allen Building
Duke University

Dear Phillip:

You asked our advice in formulating university policy on the proper standard of confidentiality of evaluations solicited from persons outside the university on decisions affecting faculty appointment, reappointment, tenure, and promotion. Our report is divided into three parts.

I. THE GENERAL IMPORTANCE OF OUTSIDE EVALUATIONS

It is the practice at Duke, as it is at many other universities, to solicit outside evaluations in composing the faculty, most commonly in the course of review for tenure, though not infrequently in respect to initial appointment, reappointment and promotion as well. The purpose principally served in seeking such evaluations is to secure assurances from well-regarded scholars and academic peers in other institutions that our own university decisions on matters of faculty staffing are being carefully and thoughtfully made.

The time required of the persons thus contacted is substantial, often several days of their working life. We could hardly expect it to be otherwise because the more useful evaluations are neither casual nor summary. Rather, each is expected to provide a fairly specific review of a faculty person's work. Typically, therefore, they take time to prepare, even where the work under review may already have been published and is familiar to the assessor.

The persons contacted in this process of faculty evaluation are generally under no obligation to Duke. Nor are they necessarily compensated for the help they provide. Rather, they respond (and most do respond) because they are expected by their profession to be helpful when called on, just as members of the Duke faculty respond similarly, when such requests come to them.

This aspect of peer group review is widely regarded as an essential means of maintaining good standards in universities. And, far from being a practice reserved principally to small institutions (i.e., institutions that might feel too lightly staffed in any given field to rely on intramural evaluations alone), it is in fact, the general practice in major universities such as the University of California, M.I.T., Chicago, Harvard, Michigan, Yale, Stanford, Virginia, and Cornell where research and scholarship count heavily, especially in tenure reviews.

II. THE NEEDS OF CONFIDENTIALITY IN PEER GROUP REVIEW

Against the preceding background we come to the general question raised by your inquiry: namely to what extent may the forthcomingness and worth of extramural evaluations depend, at least partly, on a policy of confidentiality? Based on the substantial materials we have gathered from the above-listed universities, as well as on the common sense of the matter, and on our own experience here at Duke and elsewhere, we believe it matters considerably. Indeed, some knowledgeable persons believe it is crucial to assure candor and usefulness in the materials one receives. For instance, from the University of Michigan, the Policy Advisor in the Office of the President reports the following summary of views:

Administrators of the schools and colleges at the University of Michigan-Ann Arbor are unanimous in their view that the candor, forthrightness, and therefore, the reliability of this information depends

upon it being held totally confidential. Outside reviewers are reluctant to jeopardize their professional relationship with a colleague in another school by allowing that person to become aware of their comments. In some of our more outstanding schools it is occasionally difficult to convince outside reviewers to make comments, even confidentially, since they are reluctant to have such influence upon the future career of a friend.

Significantly, Ms. Nordby (the Policy Advisor) then adds the following report:

There are three schools at the University of Michigan-Ann Arbor that have recently moved from an open evaluation system to a confidential evaluation system. They have made this change because of past experience indicating that nonconfidential evaluations are "mealy-mouthed," "bowls of oatmeal." Indeed, their past experience reveals that telephone communications of a negative nature sometimes follow complimentary written evaluations.

James Rosse, Acting President, formerly Vice President and Provost, and Professor of Economics at Stanford since 1965, declared the following in an affidavit sent us on request by the AAUP:

The process of evaluating faculty members for tenured positions at institutions of higher education cannot function without candid appraisals of a prospective appointee's work by his or her professional colleagues. However, such evaluations will not be forthcoming unless the confidentiality of both the evaluations themselves and the identity of the evaluators will be respected.

According to Norman Bradburn, Provost of the University of Chicago:

[T]he breaching of confidentiality in faculty appointive matters would destroy the effectiveness of faculty

reviews. Confidentiality is necessary to assure candid and frank evaluations in the faculty review process.

William Nordhaus, Provost and Professor of Economics at Yale University, agrees:

I believe that Yale's policy on according confidentiality to letters of evaluation solicited in the appointments process contributes significantly to the University's ability to discern and choose the best qualified individuals for appointment to or promotion within the faculty and that such ability is essential for universities seeking to achieve the highest level of academic excellence among its faculty.

Dan Steiner, Vice President and General Counsel at Harvard University, stated:

The system of peer evaluation has operated, by and large, on understandings of confidentiality. The reasons for these understandings seem to me reasonably clear. Evaluators are being asked to assess in the broadest sense the overall professional worth of the candidate. Human nature is such that many people are unwilling to answer such questions candidly and fully if the answers may soon become public knowledge or available to the candidate.

Rochus Vogt, Provost of the California Institute of Technology, expressed much the same view as well:

It is the policy of Caltech to regard letters of evaluation which are solicited for this purpose [i.e., for academic tenure] as confidential documents and not available to the candidate or to others lacking an institutional need to know. The authors of the letters are being given assurances that this confidentiality will be preserved.

We believe strongly that the loss of confidentiality would affect adversely the quality of the letters of evaluation.

We find no reason to differ with these reports and feel the views they express are instructive in assessing a proper policy here. We believe the University should fully support a general policy of encouraging confidentiality in the solicitation and use of academic evaluations. Anything less must necessarily place our institutional capacity for securing useful reviews at serious risk.

III. AFFIRMING UNIVERSITY POLICY ON OUTSIDE EVALUATIONS

Specifically, outside evaluators may be advised (even as is already commonly done) that their comments will be treated in confidence and not made a part of the candidate's general file. Moreover, although Duke will naturally comply with the AAUP expectations (that on request of the faculty candidate for appointment, tenure, reappointment, or promotion, a good faith summary of whatever were the considerations contributing to the decision will be provided including a summary of evaluator views but not direct quotation), the university will not otherwise publish or release the review unless the evaluator providing it specifically so requests. We think the better policy is to say "requests" (rather than "consents"), moreover, to avoid misunderstanding as to where the initiative rests. We think this standard policy provides the appropriate measures of encouragement and assurance to the outside reviewer consistent with good practice elsewhere.

We have not presumed to address the extent to which legal process may or may not bear on some aspects of this matter, but it is our firm impression that universities that follow the practice just reviewed—and now affirmed in this report—have tended to have their position respected in the courts much more strongly than universities that do not do so. In brief, we think this is the

best general course by far to pursue. Each department and professional school at Duke should be so advised.

Respectfully submitted,

Allan Kornberg, Chair
for
Margaret R. Bates
Jacqueline A. Reynolds
Edward A. Tiryakian
William W. Van Alstyne
Jay M. Weiss
Provost's Committee on Academic
Policy and Faculty Review

APPENDIX C

University of Chicago Report of the Committee on Confidentiality in Matters of Faculty Appointment

May 22, 1979

University of Chicago Record

Pages 165-70

(Footnotes Omitted)

I. Introduction

The University of Chicago and similar universities perform three major functions that justify their existence and contribute to the well-being of society: 1) the discovery of important new knowledge; 2) the communication of knowledge and the cultivation in students of the understanding and skills which enable them to engage in the further pursuit of knowledge; and 3) the training of students for entry into professions which require for their practice the mastering of a systematic body of specialized knowledge. The effective discharge of each of these functions requires outstanding faculty working in a collegial atmosphere.

In intellectual matters, as in many other matters, the whole amounts to more than the sum of its parts. A university faculty is not merely an assemblage of individual scholars; it possesses a corporate life and an atmosphere created by the research, teaching, and conversation of scholars which stimulates and sustains the work of colleagues and students at the highest possible level. While research and teaching are the work of individuals, these individuals depend for their effectiveness on the maintenance in the University of the conditions which make for stimulation, tolerance, and openness to new problems and ideas. There must be a feeling of mutual respect and trust among faculty members.

A critical function of the faculty of the academic units responsible for recommending appointments is to bring to the academic staff of the University individuals who will carry on research and teaching at the highest level and who will contribute to the intellectual community of the University. The appointive groups in the academic units also pass upon the reappointment, promotion, and granting of permanent tenure to faculty members on the academic staff. These activities may be described as the appointive process. The appointive process plays a central role in determining how the University will perform its major functions and contribute to the social interest. It is a complex process involving painstaking and conscientious judgment.

At the University of Chicago primary emphasis in the appointive process is placed on academic excellence. Distinction is indicated by the quality of the research and the productivity of the scholar or scientist. Qualitative factors are also essential in judging teaching ability and contribution to a university's intellectual climate. Measures of quality are difficult to develop and quantitative measures are likely to be of little use. What is sought is excellence in all aspects.

II. The Need for Confidentiality

The contribution of the University to society derives principally from the various activities of the several faculties of the University. These faculties are largely self-governing bodies, as recognized by the statutes of the University. Their form of administration is collegial rather than hierarchial; that is, decisions are reached through a process of collective deliberation.

In a collegial form of administration the process of decision depends upon rational persuasion and concern for the common good. When difficult choices must be made in a group in which there are disagreements about

the merits of alternatives, it is vital that deliberation be conducted with as full and open a discussion as possible among the members. Frankness in speaking one's mind to one's colleagues is essential for the collegial system to work well. It is precisely the belief that things said or written are shared only with members of the collegium in arriving at a decision that encourages the members to discuss the matters at hand with the fullest candor and to accept the decision after it has been reached.

Nowhere is the expectation of confidentiality more important than in the appointive process. Because members must work with one another as peers over a number of years, and in the case of tenure appointments perhaps over a number of decades, the utmost candor is essential in the evaluative process. Once a decision is reached, those who opposed as well as those who supported the decision must join together to carry it out. Confidentiality of the deliberations by members of the deliberative body and by those within the University to whom recommendations are transmitted is necessary to maintain the mutual trust and respect necessary for effective self-government of a university organized on refusal to disclose to anyone outside the University the substance of documents and discussions which are essential to a collegial basis.

Members of appointive bodies are under obligation to respect the confidentiality of discussions and documents within the University. The principles which justify the refusal to disclose to anyone outside the University the substance of documents and discussions which are essential in appointment are equally applicable to disclosures to others within the University. Members of the appointive bodies must treat their deliberations and documents as confidential.

A. The Threat to Confidentiality

We live in a world where governments seek to achieve many worthwhile goals. Governments have long supported and nurtured universities, recognizing the special contribution they make to the social good. More recently, governments have sought to eliminate discrimination against women and minority groups. There have also been new laws which have attempted to provide some measure of privacy of information obtained by the government. At the same time other new laws have provided that government make available more information about its actions so that government activity will be increasingly open to public scrutiny.

These worthwhile goals of governments may sometimes be in conflict with each other as well as with other worthwhile goals. With the advent of broad government investigations of employment practices of universities, coupled with the recent laws that provide public access to almost all information in the government's possession, the confidentiality of the university appointive processes is threatened.

While governmental investigative powers are often phrased in the broadest of terms in laws, regulations, or contract clauses, the use of such powers in a particular situation is subject to the discretion of a particular official; that discretion, moreover, may be limited by constitutional constraints and judicial interpretations designed for the purpose, among others, of protecting the individual and institutional values mentioned earlier. In a free society, no governmental investigation can have as its object the truth at any cost; otherwise, unreasonable searches and seizures would be legitimate. In every case, the responsible investigator balances the need for the information (including the availability of alternative modes of obtaining it) against the harm produced by the

investigation to important rights of individuals and institutions. To some extent that balancing process will be reviewed by the courts, but frequently, by the time a court decides, significant damage may already have been done.

Government investigations, especially when carried on by those unfamiliar with the appointive process, may be threats to confidentiality that are in fact threats to the quality of performance of the University. The relationship of investigations to the appointive process, therefore, warrants further analysis.

B. The Appointive Process

In the present state of specialization of teaching and research in universities, no individual or small group can pass adequate judgment on the scholarly qualifications of appointees in an entire university. Professors of literature, however outstanding they may be, cannot assess the achievements of mathematicians, physicists, economists, or archeologists; chemists cannot judge the academic quality of candidates for appointment in sociology or philosophy and so on. The composition of appointive bodies in universities invariably bears this condition in mind.

The external referees provide their assessments as a professional collegial duty, with no personal reward but with the expectation that others will reciprocate when the need arises, and with the satisfaction of performing a duty incumbent on those in the academic profession. The assessments are frequently time-consuming tasks involving the rereading of papers, evaluating the candidate's strengths and weaknesses, and comparing them with those of other possible candidates. Many referees are willing to furnish such a frank appraisal to a small, informed group of their colleagues at another university

with the understanding that it will be kept confidential; there are many indications that they would not do so if the evaluation were to become publicly available. There seems to be evidence that already evaluations are becoming less candid as the danger of their broad dissemination is felt by outside referees. A letter that says "X is a competent teacher and researcher" tells appointment groups nothing they need to know (unless it can be read as damning with faint praise).

The written assessments of external and internal expert assessors usually go to an appointments committee or subcommittee in the appropriate department or school. There is then a frank and detailed discussion in which the members of the committee exchange and discuss their evaluations and those received from outside. No stenographic record of these discussions is made. Often the only record of the discussions is a report of the decision made. When a decision is reached as a result of the discussion, the committee brings a written or oral recommendation for action on the candidate to a more inclusive appointive body such as the department as a whole or to the department chairman or dean.

It is important to recognize the difference between this faculty appointment procedure and that of the customary procedure followed in industry. In industry one individual in a supervisory position usually makes an evaluation of the persons under his or her supervision. The manager has authority over them; they usually report to the manager in their day-to-day operations. In the university situation, the appointments committee, as well as the more inclusive appointive body, is made up of the candidate's peers. They are the candidate's colleagues—or may become and remain so for many years to come. They are, to be sure, willing to comment publicly upon the data and ideas set forth in the individual published works of the candidate (and frequently do so in scientific and scholarly journals) but that is quite

different from an explicit and comprehensive evaluation of the person's total worth as a scholar. To make public such comprehensive evaluations of the total quality of the scholar is, inevitably, either to diminish their candor in the future or to place an intolerable strain upon relations among colleagues.

The outcome of the appointment consideration may not be complete consensus. Yet it is essential that the members of the collegium be satisfied that the decision reached is a result of full and open consideration of the candidate; they must feel secure that there has been complete candor in the evaluation of the work and promise of the candidate. At the end of extensive discussion among colleagues, a collective decision has been made. Although there may have been many differences during the discussion, once the decision is reached, it is a firm and unified decision as presented to outsiders, and as presented to the candidate. This united acceptance of the decision is an important form of support for a new individual joining the faculty or a faculty member continuing in a more senior rank.

* * * *

III. Recommendations

The preceding section has stressed the need for confidentiality in several aspects of the University's operations. In view of this need, the Committee on Confidentiality in Matters of Faculty Appointment recommends the actions outlined in the paragraphs that follow.

A. Disclosure Where Not Required by Law

Where the law does not compel disclosure, the University should not release confidential information acquired, opinions expressed, and conclusions reached during the appointive process; i.e., in appointment, reappointment, promotion, or granting of permanent tenure.

* * * *

B. Disclosure Where Required by Law

The University may be required by statute or contract to furnish to the government certain information collected as part of the appointive process. In responding to requests for such confidential information by governmental authorities, the University should bring to the attention of the responsible government officials the institutional values discussed above and should make every effort to persuade them to conduct their investigations in such a manner as will achieve their investigative goals without at the same time impairing those institutional values. Such efforts on the part of the University may include judicial proceeding designed to restrain investigators from actions that would impair the functioning of the University.

In particular, the following positions should be maintained:

1. The request for confidential information should be questioned if it goes beyond what is reasonably necessary in order to shed significant light upon the matter under investigation. Investigation of an alleged violation of law or contract within a particular department should not ordinarily be deemed to justify a request for University-wide confidential information.

2. Even within the narrow scope of proper investigation, it may be that disclosure of names and other identifying data drawn from confidential information is not essential. Where that is so, such information should be deleted before access is provided.

3. The copying of University files endangers confidentiality to a particularly high degree, especially where such copying is done by federal agencies. * * *

C. Seeking Changes in Existing Law and Regulations

With respect to categories of governmental investigation that have widely varying characteristics, it may be neces-

sary to balance the government's need for information against the University's need for confidentiality on a case-by-case basis. The regulations of the Office of Federal Contract Compliance, for example, require access "for the purpose of . . . inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation," leaving it to the investigator to specify what material "may be relevant" and to determine what portions of the material which "may be relevant" should nonetheless not be demanded because of incommensurate destruction of other values. What has evolved is a series of individual "accommodations" with various universities in which the concessions made by the most vulnerable or least concerned institution tend to establish the norm for discussions with other universities. This sort of haphazard resolution is inappropriate to the importance of the issues involved.

* * * *

We recommend, therefore, that the University, in association with other institutions of higher education, seek a revision of applicable federal laws and regulations, with the object of 1) establishing clear and reasonable prescriptions regarding the permissible scope of access to information that can be demanded of universities at various stages of grant or contract compliance investigations and similar matters and 2) limiting public disclosure of confidential university information acquired in the course of federal investigations.

The relatively standardless intrusion into the privacy of free associations, followed by broad dissemination of the information thus obtained, is a problem for many institutions in our society. For reasons given above, it is particularly destructive of the university, which depends upon a distinctively frank and sustained relationship among its members. It is appropriate, therefore, that

universities should take the lead in seeking suitable protections for themselves and for all other free institutions.

Sidney Davidson, Chairman

Norman M. Bradburn

Robert M. Grant

Robert Haselkorn

Mark G. Inghram

Harold A. Richman

Janet Rowley, M.D.

Antonin Scalia

Edward Shils

Robert E. Streeter

William J. Wilson

MOTION

(11)
No. 88-493

Supreme Court, U.S.

FILED

JUN 20 1989

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

MOTION AND BRIEF OF PRESIDENT AND FELLOWS
OF HARVARD COLLEGE AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

ALLAN A. RYAN, JR.
DANIEL STEINER*
OFFICE OF THE GENERAL
COUNSEL
HARVARD UNIVERSITY
Massachusetts Hall
Cambridge, Massachusetts 02138
Telephone: 617/495-1280

*Counsel of Record

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Motion of President and Fellows of Harvard College for Leave to File a Brief Amicus Curiae in Support of Petitioner	v
Interest of Amicus Curiae	1
Summary of Argument	3
Argument	6
I. Compulsory and Unrestricted Disclosure of Tenure Files Infringes on a University's Constitutionally Protected Interest in Academic Freedom.	6
A. Tenure Is The Means of Securing Educational Excellence And Academic Freedom.....	6
B. Academic Freedom Is A Special Concern Of The First Amendment.....	9
C. The Interest Of Combatting Invidious Discrim- ination And The Interest Of Academic Free- dom Can Be Accommodated.	10
II. Confidential Peer Evaluations Must Be Frank and Specific, And Their Disclosure In Breach Of The Confidentiality In Which They Are Given Would Be Seriously Detrimental To The Tenure Decision Pro- cess.....	13
A. Harvard and Comparable Institutions Depend On Evaluations By Outside Scholars To Secure The Very Best Appointments.....	13
B. Because Disclosure Of An Evaluator's Opinion, With Attribution To That Evaluator, Could Have Seriously Adverse Consequences, Eval- uations Are Given In Confidence.	18

TABLE OF CONTENTS - Continued

	Page
III. The Competing Interests In Enforcing Title VII And Protecting Academic Confidentiality Can Be Bal- anced.	22
Conclusion.	30

TABLE OF AUTHORITIES

	Page
CASES	
<i>Barenblatt v. United States</i> , 360 U.S. 109 (1959)	11, 12
<i>Clark v. United States</i> , 289 U.S. 1 (1933)	19
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986)	12
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F. 2d 331 n.4 (7th Cir., 1983)	13, 20, 26, 27
<i>EEOC v. University of Pennsylvania</i> , 850 F.2d 969, 974 (3d Cir. 1988)	12
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	12, 13
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	10
<i>Jackson v. Harvard University</i> , 111 F.R.D. 472 (D. Mass. 1986)	29
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir. 1977)	24
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967) ...	3, 9
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	8
<i>Paul v. Stanford University</i> , 39 EPD 35,918 (N.D. Cal. 1986)	26
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	3, 9, 10
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	10, 14
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957) ..	3, 10, 11

TABLE OF AUTHORITIES - Continued

	Page
<i>United States Department of Justice v. Reporters' Committee for Freedom of the Press</i> , ___ U.S. ___, 57 U.S.L.W. (March 22, 1989)	25
<i>United States v. Nixon</i> , 418 U.S. 683, 705 (1974)	4, 19
<i>Wards Cove Packing Co. v. Atonio</i> , ___ U.S. ___, 57 U.S.L.W. 4365 (June 5, 1989)	13
<i>Zaustinsky v. University of California</i> , 96 F.R.D. 622 (N.D. Cal. 1983), <i>aff'd</i> , 782 F.2d 1055 (9th Cir. 1985)	26

OTHER AUTHORITIES

Clark, Conclusions, in B. Clark ed., <i>The Academic Profession</i> 384 (1987)	6
Commission on Academic Tenure, <i>Faculty Tenure</i> (1973)	9, 11
Report of the President's Commission on Campus Unrest 201 (1970)	8

No. 88-493

In The

Supreme Court of the United States

October Term, 1988

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

MOTION OF PRESIDENT AND FELLOWS OF HAR-
VARD COLLEGE FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, President and Fellows of Harvard College (Harvard University) asks leave of the Court to file the attached brief amicus curiae in support of petitioner University of Pennsylvania.

Harvard University is a private research university with over 16,000 undergraduate and graduate degree candidates, in nine faculties. It has a full-time faculty of over 2500 men and women. The great majority of Harvard's senior faculty holds tenured appointments.

This case presents an important issue whose resolution will significantly affect the ways in which universities throughout the country, including Harvard, decide who shall be appointed to their faculties with tenure. Harvard University believes that, for reasons more fully articulated in our brief, universities have legitimate interests in fostering and protecting the confidentiality of the judgments and opinions that it seeks from scholars both within and without the university on the suitability of candidates for tenured appointments. These interests, we believe, must be weighed against the legitimate interests of the Equal Employment Opportunity Commission (EEOC) in combatting and redressing invidious discrimination in employment.

We support the petitioner in urging that the decision below be reversed. In so doing, we express our view that the interests both of universities and the EEOC can be accommodated in ways that neither obstruct universities unnecessarily in exercising their discretion as to who may teach nor hamper the EEOC in securing information necessary to carry out its statutory mandate. Our brief suggests a means of achieving this accommodation that we hope will be helpful to the Court in considering how

most appropriately to balance important national policies in education and employment.

Respectfully submitted.

ALLAN A. RYAN, JR.
DANIEL STEINER*
OFFICE OF THE GENERAL
COUNSEL
HARVARD UNIVERSITY
Massachusetts Hall
Cambridge, Massachusetts 02138
Telephone: 617/495-1280

*Counsel of Record

**BRIEF OF AMICUS CURIAE PRESIDENT AND
FELLOWS OF HARVARD COLLEGE
IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS CURIAE

The American university system is the best in the world. American universities have served the Nation in teaching and research in medicine, economics, history, politics, literature, business, the arts and many other fields. Our universities have achieved that preeminence in very large part on the strength of their faculties, and particularly the distinguished scholars, researchers and teachers who comprise the tenured faculties of the leading American universities.

Harvard University, as one of a number of research universities committed to excellence in teaching and scholarship, believes that its ability and that of comparable institutions to contribute to society as centers of excellence depends heavily upon the quality of its tenured faculty. To ensure that tenure is granted only to faculty members of extraordinary accomplishment and promise, such universities have devised tenure review processes which rely in significant part on candid and confidential evaluations made by the tenure candidate's scholarly peers both inside and outside the university at which tenure is sought. Such peer review is the linchpin of the tenure process.

The peer review process is fragile in a number of respects: it relies on extensive, detailed and candid evaluations by scholars outstanding in their own right, with many calls on their time; it relies on those scholars' willingness to state their judgments of people with whom they may work closely, either at their own universities or

in other professional activities; and it relies upon the readiness of the peer reviewers to provide their honest assessments even though they are under no compulsion to provide them and customarily receive no reward for doing so. The reliable promise of confidentiality is indispensable to obtaining peer reviews of the necessary quality, detail and candor.

For these reasons, universities such as Harvard have traditionally extended, and evaluators have traditionally expected, assurance that their opinions will be held in confidence by those who seek the evaluations and who will make the tenure decision. This case represents a direct challenge to this practice, and thus has far-reaching consequences for the operation of the tenure system at the heart of leading universities. If the EEOC or Title VII plaintiffs can routinely obtain complete access to tenure files, including all material reflecting peer evaluations, the peer review process will be severely damaged and possibly destroyed. This result would seriously interfere with academic freedom and run counter to the strong public interest in maintaining universities of the highest quality.

Harvard embraces the Nation's strong public policy in eliminating employment discrimination, including discrimination in academia. But we believe that this interest can be reconciled with the interest of universities in obtaining the candid evaluations necessary to make well-informed tenure decisions. We are therefore skeptical of any argument that suggests that courts must choose one of these interests to the exclusion of the other.

American universities have developed and refined the peer review process gradually over many years, and the Court should proceed with caution before requiring

drastic change in that process. In our view, the Court can effectively provide for the enforcement of Title VII rights and at the same time preserve the peer review system. It is to express that view that Harvard University submits this brief.

SUMMARY OF ARGUMENT

The decision whether to make a tenured appointment is among the most important choices that a university faces. At Harvard and comparable institutions such appointments are made only if the candidate is among, or shows promise of joining, the very best scholars in the world in his or her discipline. The decision to grant tenure is the decision of who may teach, and what may be taught, and thus is inherently part of academic freedom.

Academic freedom is "a special concern of the First Amendment. . . ." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); accord, *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). Thus, "the power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge upon [this] highly sensitive area[. . .]." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Invidious discrimination has no place in a university's decisions regarding who may teach. But the competing interests in eradicating and redressing invidious discrimination, on the one hand, and safeguarding the university's constitutionally-protected right to choose its faculty, on the other, must be accommodated through a balancing process – a process that the court of appeals here did not attempt. In any such balancing, the important role of confidentiality in the decision making process must be considered.

The tenure decision at major research universities is a comparative one, requiring that the candidate be measured against leading scholars in the discipline throughout the Nation and the world. Over many years, such universities have developed procedures that rely heavily on the considered judgment of peers outside the university (as well as those inside it) in making that comparison. The conscientious evaluator must be specific, searching and honest in his or her judgment of the candidate and of the "benchmark" scholars to whom the candidate is compared.

Because disclosure of a reviewer's appraisals beyond the very limited audience for whom they are written could have serious repercussions for the reviewer, such appraisals have always been sought, and given, in confidence. As this Court has recognized, "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon*, 418 U.S. 683, 705 (1974). If universities cannot assure confidentiality, peer reviewers will be put to a choice between honesty and collegiality, and may shy from participating at all. Similarly, faculty members and administrators who participate, within the university, in making the tenure decision require the same expectations of confidentiality if they are to render honest judgments. A national policy permitting disclosure of confidential peer review materials on demand will result in tenure decisions based on less than the best available evidence and thus will impair a university's ability to choose its faculty wisely.

On the other hand, we fully support the firm national policy against discrimination in employment, and recognize that the EEOC has a legitimate interest in obtaining information necessary to prove valid claims of discrimination. While no single approach will apply to every case, we believe this interest can be reconciled with the interests of academic freedom by following three general principles.

First, the damage occasioned by disclosure of confidential communications in the charging party's own file can be minimized if such disclosure does not permit identification either of peer reviewers or of those "benchmark" scholars to whom the charging party was compared. Second, disclosure of identifying information pertaining to peer reviewers, benchmark scholars and other third parties can be justified only where the EEOC can show a specific and particularized need for such information. Third, disclosure of tenure files of persons other than the charging party should be allowed only when the district court determines that the EEOC's need for them outweighs the privacy interests of third parties and the cumulative impact which such disclosure would have on the peer review process.

No such inquiries were attempted by the court of appeals here. Therefore, the decision should be reversed and the case remanded so that such inquiries can be made.

ARGUMENT

I.

COMPULSORY AND UNRESTRICTED DISCLOSURE OF TENURE FILES INFRINGES ON A UNIVERSITY'S CONSTITUTIONALLY PROTECTED INTEREST IN ACADEMIC FREEDOM.

A. Tenure Is The Means of Securing Educational Excellence And Academic Freedom.

Academic tenure is the contingent right of a faculty member who is appointed to a tenured position to retain the position until retirement, subject to removal ordinarily only for extraordinary cause as set forth in the regulations of the institution. At Harvard University, for example, tenured professors may be removed only for "grave misconduct or neglect of duty." The removal of a tenured professor is as rare as the impeachment of a federal judge.

Tenure is a distinctively academic phenomenon, reflecting the ancient tradition of scholarly collegiality as the highest authority in the academy. As one expert has observed, "Collective control by a body of peers is a classic form of traditional authority, one that has worn well in academic systems. Widespread in the academic world from the twelfth century to the present, it is congenial to the expression of expert judgment and has exceedingly strong ideological support in the blended doctrines of academic and scientific freedom. Collegiality . . . has democratic, antibureaucratic overtones, as decisions are to be made not by a boss but by a group of peers. . . ." Clark, *Conclusions*, in B. Clark ed., *The Academic Profession* 384 (1987).

The decision to make a tenured appointment is among the most important decisions – and collectively,

they may be the most important decisions – a university makes. Decisions granting tenure collectively determine the quality, character and reputation of an institution. Moreover, institutions have every incentive to grant tenure sparingly, and only to the most outstanding candidates, because any such decision, even an improvident one, commits the university to virtually lifetime employment.

Because tenure is so important, standards for tenured appointments are exacting. No one receives tenure at Harvard as a reward for having satisfactorily completed a probationary period and having met a general standard of merit or accomplishment. Successful candidates must be among the very best scholars in the world in their disciplines, or, if at an early stage of their careers, must show every promise of becoming such. In the Faculty of Arts and Sciences, for example, "lifetime professorial appointments are reserved for scholars of the first order of eminence." Harvard University, Faculty of Arts and Sciences, *Appointment Handbook* 3 (April 1987) (copy lodged with the Clerk). Similarly, Yale University's standards require candidates for professorships in its Faculty of Arts and Sciences "to stand in competition with the foremost leaders in their field throughout the world." Yale University, *Faculty Handbook* 29 (November 1986). Stanford University's School of Humanities and Sciences applies a similar standard:

"The first criterion for tenure is that the individual has achieved, or gives every promise of achieving, true distinction in scholarship. The published materials must clearly reveal that the person being proposed for tenure is among the very best in the field today. Thus, it is not sufficient merely to be the best of a particular experience-cohort in the discipline." (Stanford University, *Procedures and Criteria* for

Appointment, Reappointment and Promotion of Faculty in the School of Humanities and Sciences at Stanford 9 (April, 1985).

The decision is also, firmly, a collegial and academic one. Whatever the extent to which "the task of operating the university enterprise has been transferred from the faculty to an autonomous administration" (*NLRB v. Yeshiva University*, 444 U.S. 672, 703 (1980) (Brennan, J., dissenting)) in daily operations, a tenured appointment is made or foregone only after close and searching consultation with the affected department or school as well as with scholars at other institutions.¹

Although the institution of tenure has seldom been free of criticism (see, e.g., Report of the President's Commission on Campus Unrest 201 (1970)), a thoroughgoing

¹ A university is generally organized into schools or faculties, e.g., arts and sciences, medicine, and law. Each school or faculty is headed by a dean, who is responsible to the university's president (or, in universities that have one, the provost or chief academic officer who, in turn, is answerable to the President) in matters concerning his or her school or faculty. The President is responsible to the university's board of trustees. Final legal authority to make a tenured appointment normally rests with the board of trustees (or, at Harvard, jointly with the University's two governing boards).

Structures and organizations vary widely from university to university, and the process of deciding tenure is even more variegated. For example, in many professional schools the entire faculty votes on an appointment, whereas in many arts and sciences faculties only members of a department vote. In some universities, a university-wide faculty committee may consider appointments at one stage in the process. The process is almost always intricate, with several levels of consideration, reflecting the seriousness and consequences of such decisions.

review by a joint commission of the American Association of University Professors (AAUP) and the Association of American Colleges, while recommending a number of improvements in the institution, nonetheless concluded that

[A]cademic tenure, rightly understood and properly administered, provides the most reliable means of assuring faculty quality and educational excellence, as well as the best guarantee of academic freedom. So central is academic freedom to the integrity of our educational institutions – and to their effectiveness in the discovery of new knowledge, in conservation of the values and wisdom of the past, and in the promotion of critical inquiry essential to self-renewal – that academic tenure should be retained as our most tested and reliable instrument for incorporating academic freedom into the heart of our institutions. (Commission on Academic Tenure, Faculty Tenure 21-22 (1973) (hereafter "Faculty Tenure")).

B. Academic Freedom Is A Special Concern Of The First Amendment.

This intimate connection between tenure and academic freedom strikes a constitutional chord. As this Court has recognized, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ." *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967); accord, *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., announcing the judgment of the Court.) This is because "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom

of thought, and freedom to teach – indeed, the freedom of the entire university community.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citations omitted).

This Court stated in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decisionmaking by the academy itself. . . .” *Id.* at 226 n.12 (citations omitted). Such autonomous decisionmaking includes “ ‘the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (citation omitted) (Frankfurter, J., concurring), *quoted in Regents of the University of California v. Bakke*, *supra*, 438 U.S. at 312 (Powell, J.).

When universities and their professors were under attack a generation ago for suspicion of “subversion,” this Court observed that “[t]he essentiality of freedom in the community of American universities is almost self-evident,” and warned that “the power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as . . . freedom of communication of ideas, particularly in the academic community.” *Sweezy v. New Hampshire*, *supra*, 354 U.S. at 250, 245. That principle should control the disposition of this case.

C. The Interest Of Combatting Invidious Discrimination And The Interest Of Academic Freedom Can Be Accommodated.

Although tenure itself is not under attack in this case, the EEOC has sought to enforce “the power of com-

pulsory process” to examine how the University of Pennsylvania has decided “who may teach.” Because “[t]he award of tenure . . . is a decision about the future quality, content, and direction of the institution’s educational program” (Faculty Tenure, *supra*, at 62), it is an area “of academic freedom . . . in which government should be extremely reticent to tread.” *Sweezy*, *supra*, 354 U.S. at 250.

We do not suggest that the EEOC’s purpose in attempting to invoke “the power of compulsory process” is to enforce political orthodoxy at the University of Pennsylvania. Instead, the EEOC’s statutory mission of enforcing federal law prohibiting discrimination is complementary to, rather than inconsistent with, the purposes served by the peer review process, which exists to provide universities with the information necessary to make informed decisions on the basis of academic merit. Discrimination on the basis of invidious criteria such as those proscribed by Title VII has no place whatever in a secular university’s decisions regarding “who may teach.”

But to affirm the legitimacy of the EEOC’s purpose is not to gainsay the sensitivity of its inquiry, nor to sweep aside, as the court of appeals did here, all concerns save how the evidence the EEOC seeks relates to its statutory mission. A university is not a “constitutional sanctuary,” but “where First Amendment rights are asserted to bar governmental interrogation resolution of the issues always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

Such "competing private and public interests" are plainly present here. If the EEOC can subpoena faculty tenure files pertaining both to individuals claiming to be victims of discrimination and third parties who may have no involvement in the tenure process at issue, tenure decisions throughout the Nation will be adversely affected, including decisions as to which discrimination is never claimed. Indeed, as we shall show below in Part II(B), disclosure of confidential peer review materials to the EEOC or Title VII plaintiffs would limit in important ways a university's ability to obtain data essential to making well-informed tenure decisions. For this reason, the outcome mandated by the Third Circuit significantly impairs the First Amendment rights of universities to decide on academic grounds who may teach.

The essential error of the court of appeals here is that it did not "balanc[e] . . . the competing private and public interests at stake. . . ." *Barenblatt, supra*, 360 U.S. at 126. It followed its earlier decision in *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986) and "declined to create a[n] . . . exception for academic institutions, concluding that Congress delivered a 'clear mandate' subjecting academic institutions to the express requirements of Title VII." *EEOC v. University of Pennsylvania*, 850 F.2d 969, 974 (3d Cir. 1988). But that undoubted mandate begs the question; it does not answer whether the EEOC may use compulsory process to carry out its mandate regardless of the impact on the university's academic freedom interest in deciding who may teach. *Compare Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982).

The courts that have attempted to accommodate the competing interests in eradicating discrimination and in

preserving academic freedom have done so in different ways. Some courts have engaged in a balancing of constitutional interests (see *Gray v. Board of Higher Education, supra*); others have fashioned a limited and qualified academic privilege (see *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983)). But the device used to accommodate the interests is secondary; what is important is that accommodation be achieved. As we show below, it can and must be.²

II.

CONFIDENTIAL PEER EVALUATIONS MUST BE FRANK AND SPECIFIC, AND THEIR DISCLOSURE IN BREACH OF THE CONFIDENTIALITY IN WHICH THEY ARE GIVEN WOULD BE SERIOUSLY DETRIMENTAL TO THE TENURE DECISION PROCESS

A. Harvard and Comparable Institutions Depend On Evaluations By Outside Scholars To Secure The Very Best Appointments.

Because tenure decisions are critically important if institutions of higher education are to develop and main-

² In its recent decision in *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 57 U.S.L.W. 4583 (June 5, 1989), the Court emphasized that because the judiciary is "generally less competent than employers to restructure business practices," it "should proceed with care before mandating that an employer adopt . . . alternate selection or hiring practice[s] in response to a Title VII suit." 57 U.S.L.W. at 4588 (citation omitted). The Court should be equally cautious in adopting procedures for enforcing Title VII which would jeopardize the selection practices which universities have adopted in making tenure decisions. Such care is particularly appropriate in the academic

(Continued on following page)

tain excellent faculties, Harvard and comparable institutions grant tenure only after assuring themselves that the tenure candidate satisfies their stringent standards. As these standards (*see p. 7, supra*) suggest, candidates for tenure are not weighed in a vacuum. Instead, amici apply comparative standards, under which the grant of tenure depends in large part upon how the particular candidate's scholarly accomplishments and promise compare to "scholars of the first order of eminence." Harvard University, Faculty of Arts and Sciences, *Appointment Handbook* 3.

In making tenured appointments, Harvard, like most research universities, does not rely solely on the views of its own faculty members. Instead its procedures, developed over many years of experience, require detailed and specific advice from scholars at other universities, learned societies or independent institutes who are themselves accomplished specialists in the relevant field. Stanford, for example, requests written evaluations from outside peer reviewers prior to the time a tenure recommendation is made by the relevant department; the departmental chairman sends letters to the outside reviewers identifying the tenure candidate and requesting a "comparative evaluation of the candidate's strengths and weaknesses relative to others of recognized excellence in the same field and of a similar level of professional development." Stanford *Faculty Handbook* 28

(Continued from previous page)

context, where the Court has repeatedly indicated that the judiciary owes special deference to academic decision making. *See, e.g., Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985).

(emphasis in original). These evaluations are reviewed by a departmental search committee and the department as a whole and play a large part in the department's decision whether to recommend tenure.

At Yale, the search committee solicits evaluations of the most promising candidates by a letter which presents an alphabetical list of four to eight scholars under consideration, including any internal candidates for promotion; the letter requests a comparison of the scholarship and teaching of these and any other suitable candidates. The letter specifically seeks the outside scholars' views of the candidates' "suitability for appointment to the position and . . . [a] comparison of their achievements and future promise," including comments on "their respective strengths and weaknesses." Yale University, *Procedures for Faculty Searches, Appointments, Leaves and Terminations for 1980-81*, Appendix B.

Harvard's Faculty of Arts and Sciences sends "blind letters" asking six or more outside peer reviewers to assess and rank five to eight named persons at comparable stages of their career; one of the named persons, undisclosed, is the candidate. The department votes on tenure only after it receives the responses to this blind letter. If the departmental vote is favorable, the department's chairman writes a letter of recommendation to the Dean proposing the tenure candidate, which must specifically discuss the responses to the blind letters. Similarly, each tenured member of the department is asked to write a confidential letter to the Dean providing a detailed explanation of his support for, or opposition to, the candidate. These letters may also discuss the peer reviews received in response to the blind letters.

After he receives the departmental recommendation, the Dean normally names an ad hoc committee to be chaired by the President, and ordinarily composed of three or four scholars from outside the university and a smaller number of tenured faculty within it but outside of the affected department. The entire academic dossier is sent to members of the ad hoc committee, who later meet with the President and hear departmental witnesses summoned to give testimony favoring or opposing the appointment of the candidate. The committee then advises the President whether an appointment should be made and, if so, who should be appointed. By reviewing the primary evidence, the members of the ad hoc committee, especially the external scholars, evaluate the evaluations and thus become evaluators themselves.

Such extensive resort to the scrutiny of scholars not affiliated with the university is a critically important part of the tenure review process, for several reasons. In the first place, using peer reviewers from outside the university results in more informed decisionmaking. A tenure review process that utilizes peer reviews from six experts at six leading institutions around the country will almost certainly provide more discerning judgments about tenure candidates than an effort confined to the university's own department. Moreover, the use of peer reviewers from outside the university is unquestionably necessary to obtain the comparative judgments upon which the tenure process depends. Given the present high degree of academic specialization, the number of scholars qualified to render opinions concerning a candidate's stature in a competitive ranking in his or her academic discipline will necessarily be limited. These scholars will be located on campuses throughout the Nation (and quite often in other

countries as well), inasmuch as no university has a monopoly on teaching and research in any particular discipline. Thus, a university considering whether to grant tenure to a faculty member who specializes in Shakespearean drama necessarily has to consult Shakespearean scholars at other universities, as well as professors of English Literature within the university who specialize in the works of other writers or periods.

In addition, a university that relies only on its own tenured faculty to judge the merits of candidates for tenure will, in time, tend to parochialism. No department can long sustain the diversity and creativity necessary to a first-rank faculty by selecting only its own graduate students as junior faculty and then tenuring them, no matter how bright they may be. Resort to outside scholars tends to deter departments from falling into this intellectual rut.³

³ Peer reviews from scholars outside the institution are important even where the tenure candidate is a member of the university's junior faculty. In these cases, the use of outside reviewers to make comparative judgments provides a safeguard against possibly parochial decision making by the candidate's own department, by insuring that the university will not apply less rigorous standards to candidates already inside the institution.

The use of outside reviewers is also extremely important when a university wishes to upgrade a particular department. In such cases, the university may insist on applying higher standards for tenure candidates than might be applied by the department itself. Thus, there are a variety of situations in which outside peer review is not only important (as it is in all cases), but absolutely critical to ensuring that tenure is given only to candidates who demonstrate truly outstanding teaching and scholarship.

An evaluator asked to compare and contrast the leading scholars in his or her field to guide another university in its choice cannot adequately discharge that obligation with a mere numerical ranking, nor with conclusory statements of praise or criticism. The conscientious evaluator must be specific, searching and blunt in his or her appraisals. He or she must have the intellectual honesty to say that Professor A is no longer doing prime research, or that Assistant Professor B's work is largely derivative of others in the field or that Professor C, although pursuing innovative concepts, has been erratic, and that only Professor D, though not widely known, has the creativity, discipline and potential that characterizes a truly innovative and influential thinker at the threshold of a distinguished career. Further, if it is to be truly useful, the evaluator's analysis must set forth the basis for its judgments, usually by specific reference to the scholar's recent works. Mere endorsements of the candidate are of little use. Appendix A is a redacted copy of such a letter received by Harvard University. This letter exemplifies the thoughtful, candid comparative evaluations that are needed and that (as we show below) will not be provided if such letters are routinely disclosed.

B. Because Disclosure Of An Evaluator's Opinion, With Attribution To That Evaluator, Could Have Seriously Adverse Consequences, Evaluations Are Given In Confidence.

Because such appraisals are informed and perceptive, their disclosure could have serious repercussions. The evaluator is often speaking of people he or she knows well, professionally and possibly personally too. They are people that the evaluator may be working closely with at

the moment or may find herself working closely with in the future. They may serve together on a professional society's task forces, on editorial boards of the discipline's journals, or on peer review panels for federal grant funding. Indeed, the evaluator may find herself soon submitting a paper for publication, or a grant proposal for funding, on which a colleague whom she has evaluated must pass. Such publication or funding decisions can be critical to the evaluator's career, and it requires little imagination to envision the embarrassment – and worse, the possible prejudice to publication or funding – that could result if appraisals attributed to the evaluator slipped beyond the very limited bounds for which they were written.

The evaluations, therefore, have always been confidential. They are requested by, given to, and considered by, only those who will participate in the decision whether to offer tenure. This confidentiality is the only effective means to ensure frank and detailed responses. As this Court has recognized, "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Examples of similar concern in the non-academic world are not hard to find. As the *Nixon* Court noted, the meetings of the Constitutional Convention "were conducted in complete privacy." *Id.* at 705 n.15. Jury deliberations are confidential because "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments . . . were to be freely published to the world." *Clark v. United States*,

289 U.S. 1, 13 (1933). Indeed, this Court's own deliberations in conference are wholly confidential, for the same reasons.

Any decision by this Court that allows lower courts to order production of peer reviews without taking into account the legitimate interests of the academic community in preventing disclosure of attributed opinions will have a seriously adverse effect on a university's ability to obtain them. Because an outside evaluator customarily receives no personal reward, and because participation does not even benefit his or her own institution, both participation in the process and the honesty that the process requires depend on nothing more than the peer reviewers' sense of professional obligation. If universities cannot assure evaluators that their evaluations will remain confidential, peer reviewers who have legitimate criticism of a tenure candidate's scholarly merits will be put to a choice between honesty and collegiality, and may shy from participating at all. As the Provost of Stanford University stated in a declaration filed in the University of Pennsylvania's suit against the EEOC:

"I [like] most senior members of Stanford's faculty, have regularly been requested to comment on the scholarly writings of people in my academic field being considered for tenure at other institutions. I can certainly think of cases in which I would have refused to take the time and trouble to read, evaluate and write a detailed review of the candidate's work if I had not been guaranteed confidentiality." (Affidavit of James N. Rosse, filed in *University of Pennsylvania v. EEOC*, United States District Court, District of Columbia No. 87-1199.)⁴

⁴ Similarly, Yale's President stated, in a affidavit filed in *EEOC v. University of Notre Dame du Lac*:

(Continued on following page)

The very same concerns extend to the stages of the tenure decision process that follow receipt of the peer evaluations, because the evaluations heavily influenced those stages. Universities do not make tenure decisions simply by counting favorable and unfavorable letters, which seldom fall into such neat categories in any event. Although the specific procedures of universities in making tenure decisions vary, the confidential evaluations will at most institutions be reviewed successively at least by a candidate's academic department and an ad hoc committee. They may also be reviewed by the appropriate dean, the provost and the president as each prepares a recommendation for the next higher level. Each letter, as it goes through this review, will be weighed by each participant in the decision making process according to the strength or tentativeness of the recommendation and its overall cogency. All of these participants will also conduct their own examination of the candidate's academic dossier. Thus, by the time the decision is made, a tenure file has accumulated not only the outside evaluators' appraisals of the candidate (and of the various

(Continued from previous page)

"Yale's long-standing policy is that these letters ordinarily will remain confidential and [be] reviewed only by 'those who by usual practice transmit, or vote on, appointment or promotion.' This is intended to encourage those scholars who submit letters of evaluation to be as precise and candid as possible and to include the comparative judgments of other scholars in the candidate's field - characteristics essential to Yale's ability to select the most qualified candidate and to achieve that degree of academic excellence that is to be prized not only in our scholarly community but by society as a whole." (Citation omitted.)

individuals to whom the candidate has been compared) but also the evaluations of *those* evaluations as they are made by the faculty and administrators in the final steps of the tenure decision. The reasons that confidentiality is important for the external evaluations apply with equal force to the internal evaluations, and their disclosure will similarly result in less exacting scrutiny of tenure candidates.

A national policy permitting disclosure of confidential peer review materials on demand by the EEOC or a Title VII plaintiff will destroy the expectation of confidentiality held by peer reviewers and thus inhibit their evaluations. The inevitable result will be tenure decisions that are less well informed and, thus, less successful in differentiating between those who deserve tenure and those who do not. Because tenure decisions collectively determine the quality of a university, impairing the tenure review process will adversely impact the ability of universities to maintain intellectual excellence and thus provide the Nation with the scholarship and research which have made American universities the best in the world.

III

THE COMPETING INTERESTS IN ENFORCING TITLE VII AND PROTECTING ACADEMIC CONFIDENTIALITY CAN BE BALANCED.

Were the interests of the university in making its tenure decisions the only weighty concerns, a strong argument could be made that the confidentiality of evaluations should be absolute. But we recognize that the EEOC has legitimate claims to information so that it may

carry out its mandate under Title VII. Harvard believes that these interests of confidentiality and access can be accommodated without significant harm to either, and in this section, we suggest an approach that we believe is practical, sound and fair.

We realize that, on this record, the Court has a limited basis from which to articulate in the first instance a detailed scheme for the resolution of all conceivable clashes between the interests of confidentiality and access. This is particularly true when one considers that, among American universities, the procedures for reaching a tenure decision vary and that one university's specific confidentiality interests may therefore vary in degree or emphasis from another's.

If, as we urge, this Court holds that relevance is not the only consideration governing access to tenure review materials, and that the university's interests must be given appropriate weight in the circumstances of each case, it must reverse the judgment below and remand the case so that the district court, in light of this Court's decision, can decide how the balance should be struck in reconciling the needs of the EEOC and the confidentiality interests asserted by the University of Pennsylvania.

However, as a general matter, we believe that a fair balance of competing interests in the investigation or litigation of allegedly discriminatory decisions can be achieved based on three general principles.⁵ First, the damage occasioned by disclosure of confidential communications contained in the plaintiff's file can be minimized if such disclosure does not permit identification

⁵ Because the interests at stake, and their resolution, do not vary significantly in subpoena enforcement proceedings and Title VII lawsuits, we shall use "EEOC" to include the plaintiff in a Title VII action and "plaintiff" to include the charging party in an EEOC investigation.

either of peer reviewers or of those "benchmark" scholars whose work is evaluated and compared to that of the tenure candidate. Second, only in the most extreme cases should the names and other identifying information pertaining to peer reviewers, benchmark scholars and other third parties be disclosed, upon a showing of "particularized need" sufficiently strong to counterbalance the severe adverse impact which disclosure of such identifying data would have on peer review confidentiality and privacy. Third, disclosure of confidential material about tenure candidates other than the plaintiff should be required only when the EEOC's need for disclosure outweighs the privacy interests of third parties and the cumulative impact which such disclosure would have on the peer review process. We discuss these principles in turn.

1. In the great majority of cases where the university denies tenure, it does so because it concludes that the unsuccessful candidate's academic record and potential did not meet the institution's standards for tenure. Accordingly, the EEOC in such cases will have a legitimate need to discover the substance of the tenure file on which the decision is based, including the substance of evaluations made by peer reviewers both inside and outside the university.⁶

The university's legitimate and important interest in confidentiality could be absolutely safeguarded only by

⁶ When a university bases its decision on reasons independent of the tenure file, disclosure of that file ordinarily will not be required. See, e.g., *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir. 1977). The analysis in this section of our brief assumes that the university's decision is not based on reasons independent of the file.

preserving from disclosure both the substance of the peer reviews and the identity of the reviewers. But the university's own interests are not the only ones in the balance, and the damage to confidentiality can be lessened if the information is presented in a form that prevents the unsuccessful tenure candidate from identifying either the evaluators or the benchmark scholars.⁷ Accordingly, we believe that disclosure of the substance of the internal and external evaluations, where those evaluations were relied on during the decision-making process, is a fair reconciliation of the conflicting interests at stake. For these reasons, substantive information, duly protected, in the plaintiff's file may be disclosed pursuant to subpoena or discovery request.⁸

⁷ The reasons that the university must protect the peer reviewers are obvious. Somewhat different reasons justify protection of the benchmark scholars. These persons have separate and identifiable privacy interests in preventing disclosure of information contained about them in university files. See e.g., *United States Department of Justice v. Reporters' Committee for Freedom of the Press*, ___ U.S. ___, 103 L. Ed. 2d 774, 789 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person"). This privacy interest is particularly strong because the benchmark scholars will normally have had no involvement in the tenure process other than as passive standards of reference used by peer reviewers for purposes of comparison. Indeed, the benchmark scholars often will not even know that the university's files contain sharp and detailed judgments on their academic achievements.

⁸ The means of protecting names and other identifying data have varied from institution to institution and case to case, and this Court need not choose among them on this

(Continued on following page)

By providing the substantive information in the plaintiff's tenure file, the university discloses the way the tenure decision was reached and the reasons on which it was based. Because the tenure review process depends to a large extent on detailed written evaluations of the tenure candidate, the disclosure of the substantive information in a tenure file will give the EEOC more information than will be true for employment decisions made in non-academic contexts. Withheld are only the names (and data that would reveal the names) of those who provided advice to the decisionmakers. Protecting the identities of peer reviewers and benchmark scholars will not deprive the EEOC of any significant information to which it would otherwise presumptively be entitled.

2. The routine disclosure of identifying information would have a shattering impact on peer review confiden-

(Continued from previous page)

record. For example, some courts have required the defendant university to provide summaries of the charging party's file in the first instance, permitting greater disclosure only if it is determined that the summaries did not fully reflect the basis for the university's action. *Zaustinsky v. University of California*, 96 F.R.D. 622, 625-26 (N.D. Cal. 1983) *aff'd*, 782 F.2d 1055 (9th Cir. 1985); *Paul v. Leland Stanford University*, 39 EPD ¶ 35,918 (N.D. Cal. 1986). Universities in other cases have voluntarily provided redacted files, without offering summaries as an alternative. See, e.g., *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331, 337 n.4 (7th Cir. 1983). In either case, however, the district court will be free to monitor the process if necessary, in order to ensure that the process does not deprive the plaintiff of necessary information while at the same time adequately preventing disclosure of potentially identifying information. We believe that, generally, universities will have no objection to submitting confidential original documents to the district court for such purposes.

tiality, for obvious reasons. In exceptional cases, however, even such disclosure may be justified. If, following the production and review of the substance of the plaintiff's file, he or she claims a need to discover the names of inside or outside evaluators, or the identities of benchmark scholars, we believe such claims should require a showing that extends significantly beyond mere relevance. The Seventh Circuit in *Notre Dame* compared such a standard to that necessary for disclosure of grand jury materials: that is, a substantial showing of particularized need that establishes a compelling necessity for the specific information requested. See *EEOC v. University of Notre Dame du Lac*, *supra*, 715 F. 2d at 338. Without addressing the comparative confidentiality interests of the university and the grand jury, we believe this standard is appropriate, understanding it to mean, at a minimum, that the EEOC cannot rest on general assertions that the information it seeks may turn up evidence of discrimination or may assist it in assessing the case against the university. Rather, it must demonstrate, with specific reference to the evidence already available, that the disclosure of protected information will likely advance, in a demonstrable and significant way, a showing that the university has discriminated against the plaintiff.

This is, and should be, a stringent standard, considering the extensive and relevant information that the university will have already made available, the marginal relevance in any employment discrimination litigation of any information that, by definition, does not go to the identities or acts of decision makers, and the critical damage that disclosure of such data would have on information gathering for tenure decisions by universities

nationwide. It should be ordered only if the court has a firm and abiding conviction, objectively supported on the specific facts of the case, that it cannot fairly decide the matter without such disclosure.

3. Additional interests militate against disclosure when – as in this case – the EEOC seeks the files of tenure candidates other than the plaintiff. Such requests by definition implicate the privacy interests of such candidates, who may well be complete strangers to the tenure decision at issue. *See* n. 7, *supra*. Redaction of such files may not protect these interests adequately, because the plaintiff will usually know or be able to ascertain the names of other tenure candidates. Such concern is particularly acute in this case, where the EEOC seeks to discover only five purportedly comparable files belonging to the charging party's five colleagues.

Disclosure of third-party files also has a more destructive impact on academic confidentiality than mere disclosure of files pertaining to a single charging party or plaintiff. Disclosure of the plaintiff's own file where a charge or lawsuit is brought is one thing; disclosure of multiple files in a single case is quite another. In such instances, evaluations of one candidate given in confidence may be revealed years later in proceedings involving different candidates, and thus evaluators will have no assurance that their judgments will ever be kept private. This prospect will surely inhibit candor endemically in peer reviews.

We do not suggest that disclosure of such third party files – names and identifying data of subjects, peer

reviewers and benchmark scholars⁹ – is never justified. Whether, in a given case, the EEOC has shown a sufficient need for third party files to justify such broad scale disclosure must necessarily be determined on the facts of that case, with reference to factors such as whether the tenure decisions reflected in the requested files are truly comparable (*e.g.*, made by the same decisionmakers under the same announced standards), whether the non-confidential materials already provided by the university raise a colorable inference that different standards were applied to the third parties whose files are being sought, the degree to which summarization or redaction provides a feasible method to conceal the identities of the subjects of such files, and so forth. *See, e.g., Jackson v. Harvard University*, 111 F.R.D. 472, 474 (D. Mass. 1986). Because the inquiries necessary to such balancing were not made here, the Court should remand this issue for the district court's consideration in the first instance.



⁹ For the same reasons that apply to plaintiff's file, the identities of peer reviewers and benchmark scholars in third party files must be protected. It is difficult to imagine any circumstances in which the identity of benchmark scholars and peer reviewers of third parties will have any relevance to the plaintiff's discrimination claim. In addition, the privacy interests of the third parties themselves also merit protection.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings in light of the Court's opinion.

Respectfully submitted.

ALLAN A. RYAN, JR.

DANIEL STEINER*

OFFICE OF THE GENERAL
COUNSEL

HARVARD UNIVERSITY

Massachusetts Hall

Cambridge, Massachusetts 02138

Telephone: 617/495-1280

*Counsel of Record

JUNE 1989.

This letter is in response to yours of [redacted] requesting help in evaluating a group of candidates for the position of [redacted]. You ask specifically for a ranking of the candidates and for a comparative evaluation among them.

In my opinion, serious consideration should be given to three of the five candidates on your list: [redacted]. I eliminate [redacted] for the following reasons.

I would place [redacted] at the bottom of a ranked list because of his relatively quite late arrival, compared with all the others, on the scene of the [redacted]. His depth of experience does not compare with that of the other candidates. Furthermore, his breadth is narrow. He is, of course, one of the leading [redacted] in the country, which gives considerable sophistication to his studies of [redacted]. But he has had virtually no exposure to, nor has he shown interest in, [redacted] has any other material. His approach to the study of [redacted] has been [redacted] rather than [redacted], given his expressed desire to elucidate the history of the use and development of [redacted]. His knowledge of [redacted] and [redacted] are entirely superficial. To be quite honest, I doubt that speciousness will lessen much, as [redacted] exhibits little excitement about issues of [redacted] concern although he has had every opportunity to develop such interests. Finally, I must admit from many years of professional acquaintance with him, that [redacted] is the last person to "... act as a bridge between the community of [redacted] and [redacted] both within Harvard and outside" (quote from your letter). I have been present at several conferences over the years, attended by [redacted] and [redacted] working with [redacted], during which [redacted] has expressed publicly an uncommon condescension towards his audience. He has alienated many [redacted] through such behavior. He would not lend to your enterprise the quality of leadership you seek.

[redacted]: Although I have heard of [redacted], I must confess at having to resort to the [redacted] Library's card catalogue to discover what kinds of research he has done that pertains to the general field of the [redacted]. As a [redacted], his research in the [redacted] arena has quite naturally turned to [redacted]. But the last entry on file for him at the [redacted] is dated 1977 -- a review article in [redacted] on [redacted]. Not having his curriculum vitae as an aid, I can only surmise that [redacted] is not an aggressively active scholar in the field. Since I read most of the pertinent literature in the [redacted], I am surprised never to have come across his work. Of all the candidates, he seems farthest removed from your core of needs. And I take it from your letter, and from my experience as Chairwoman of the [redacted], that [redacted] is not a central thrust of your [redacted]. Therefore, ranks rather low in my general assessment of the match between needs and abilities.

At this point, the task becomes more difficult, because the three remaining candidates are all internationally known scholars, and I believe any one of them would serve well as the [redacted].

2

_____ stands out as especially suited to undertake the direction of your new _____. I know _____ well, since the mid-sixties when, as a graduate student, I spent almost a year at the _____ Department of the _____. _____, conducting the research for my master's thesis. He is a serious, meticulous, and most generous scholar, one who works easily with others. Indeed, a large part of his _____ career has been spent in close collaboration with _____ and with _____ in other fields of specialty. At the moment he is participating in a research problem in _____ generated by one of my graduate students. His interaction with her has been at the same level of consideration and respect and has evidenced the same critical acumen in approaching the data as he shows his peers. This comes from _____'s genuine appreciation for the quality of any research effort in which he engages, and it comes too from his care for his colleagues, at whatever stage of professional accomplishment. During his years at _____ he has worked often -- perhaps primarily -- with graduate students in _____ who were there to conduct their dissertation research with him and with _____. He is, therefore, quite at home with sophisticated students in the _____, in spite of the fact that he has not offered formal classes to such students.

_____ has a good sense of problem in _____ which is key to the role your _____ director must play. He reads broadly in the field but is entirely modest about his level of _____ sophistication. I find him refreshing and intellectually honest. He would serve as a director students would respect and admire and as a colleague whom others -- certainly I -- would seek out for collaborative research.

As you know, the analytical technique for which _____ is best known is _____, and most of his research has involved the _____. He is a _____, not a _____. Nevertheless, I have no doubt whatever that he can take in hand and run smoothly and with skill a _____ as diverse in its analytical range of _____. I am equally sure that _____ will quickly address himself to the problems attendant upon the analysis of the unusually wide spectrum of _____ that is the normal concern of such a _____. _____ is an exceedingly fine _____ with a "nose" for _____. That is important, for many _____ do not develop that interest in the _____ for many _____ in the way that _____ commonly do. _____ is quite special in that sense.

In dealing with the results of his [redacted], [redacted] uses the most current [redacted] approaches to the interpretation of large bodies of complex data. He is entirely at home with [redacted] and [redacted] and with the appropriate uses of [redacted] and [redacted]. In this sense he will be a real resource to students as well as to colleagues and could easily stimulate that aspect of [redacted] activities into a major and important focus.

The one area in which [redacted] lacks the many years of experience of [redacted] is formal university teaching. That is a distinct disadvantage. Nevertheless, as director of [redacted] -- of which Harvard University and [redacted] are important participants -- I can envision engaging [redacted] in the design of new graduate subjects he might offer as part of the [redacted] unique graduate program. Such an enterprise would be exciting for all of us, and he is the right person for the undertaking.

[redacted] is a [redacted] of international stature, mature, and of great integrity. He would be an important resource to the community of scholars in the [redacted] that has concentrated in the greater Boston area and which has given this area its reputation as one of the leading international centers for research and training in the field. He would also put [redacted] back on its feet, after a shaky beginning.

I will not dwell at such length on the merits of the remaining candidates on the list -- [redacted]. Of the two, [redacted] would be my next choice, following [redacted]. He is one of those rare individuals who combines sophistication in [redacted] and [redacted] with a sound grounding in the [redacted]. His research is careful and impressive, and I have no doubt he is a skilled teacher. At this moment in [redacted] history, however, I do not believe [redacted] is quite what the [redacted] needs for its reorganization and direction. But he would be a welcome colleague should your committee choose him, and I would certainly look forward to working closely with him in [redacted].

[redacted] is another colleague I have known for many years. He is entirely committed to the [redacted] as his primary professional concern and co-directed for many years, with [redacted], the center for such studies at the [redacted]. My impression is, however, that [redacted] would not bring to [redacted] the kind of initial quiet care the [redacted] will need to get it back on course. He is aggressive and energetic but perhaps overly so for the circumstances.

AMICUS CURIAE

BRIEF

13
No. 88-493

Supreme Court, U.S.
FILED

JUN 23 1989

JOSEPH E. GRANIEL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SHELDON ELLIOT STEINBACH *
AMERICAN COUNCIL
ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036-1193
(202) 939-9355

Counsel for Amicus Curiae

June 23, 1989

* Counsel of Record

QUESTION PRESENTED

Amicus curiae will address the following issue:

Whether a university's constitutionally protected academic freedom shields from unjustified disclosure to the Equal Employment Opportunity Commission ("EEOC") confidential peer review materials created during the tenure decision-making process.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. PEER REVIEW MATERIALS GENERATED DURING THE ACADEMIC TENURE REVIEW PROCESS ARE PROTECTED UNDER THE FIRST AMENDMENT	6
A. Academic Freedom Including The Associational Interest Of The Institution In Autonomy Is Protected By The First Amendment..	6
B. The Tenure System Is An Essential Element Of Institutional Autonomy Protected By The First Amendment	9
C. Confidential Peer Review Is Essential To The Tenure Decision	11
II. RESORT TO PEER REVIEW MATERIALS IN MANY DISCRIMINATION CLAIM INVESTIGATIONS IS UNNECESSARY	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
<i>Adler v. Board of Education</i> , 342 U.S. 485 (1952) ..	7
<i>Clark v. United States</i> , 289 U.S. 1 (1933)	13
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 211 (1979)	14
<i>EEOC v. Associated Dry Goods Corp.</i> , 449 U.S. 590 (1981)	17
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110 (3d Cir. 1985), <i>cert. denied</i> , 476 U.S. 1163 (1986)	4
<i>EEOC v. University of Notre Dame Du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	11, 17
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	6, 8, 20
<i>Kunda v. Muhlenberg College</i> , 621 F.2d 532 (3d Cir. 1980)	11
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975)	14
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	15
<i>Pittsburgh Plate Glass Co. v. United States</i> , 360 U.S. 395 (1959)	13, 14
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	6, 8
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	8, 9
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957) ..	4, 5, 6, 7
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	13
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	7
Statutes	
42 U.S.C. §§ 2000e et seq.	17
Other Authorities	
American Association of University Professors, "Academic Freedom and Tenure, 1940 Statement of Principles and Interpretive Comments", reprinted in <i>AAUP Policy Documents & Reports</i> 3 (Washington, D.C. 1984)	10

TABLE OF AUTHORITIES—Continued

	Page
American Association of University Professors, "Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments" (1980), reprinted in <i>Academe: Bulletin of the AAUP</i> 27 (Feb.-March 1981) ..	9, 21, 22
American Historical Association Institution Services Program, <i>Guide to Departments of History 1988-89</i> (1988)	13
<i>Chronicle of Higher Education</i> , Sept. 29, 1980, at 24	17
1 <i>EEOC Compliance Manual</i> (BNA) § 24.1(a) (Feb. 1988)	21
Letter to Dr. Phillip A. Griffiths, Provost, Duke University, from Provost's Committee on Academic Policy and Faculty Review (March 10, 1988)	11, 12, 13, 15, 17
Note, <i>Preventing Unnecessary Intrusions of University Autonomy: A Proposed Academic Freedom Privilege</i> , 69 Calif. L. Rev. 1538 (1981) ..	7, 15, 16, 17
"Report of the Committee for the External Review of the Rutgers University Promotion Process" (Aug. 1987)	11, 12
"Report of the Committee on Confidentiality in Matters of Faculty Appointment," U. Chi. Rec. 165 (May 22, 1979)	passim

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-493

UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Council on Education ("ACE") is the nation's major coordinating body in postsecondary education. Founded in 1918, ACE is a voluntary membership organization with 1,389 member nonprofit institutions of higher education from both the public and private sectors and 178 member educational associations and organizations. Institutions of higher education routinely look to ACE policy statements for guidance in developing their institutional rules and regulations. ACE's national scope and the diversity among the types of institutions and organizations that it represents make ACE uniquely qual-

ified to present the views of the higher education community on legal questions affecting educational policy and academic freedom to the Court.

ACE has a special interest and expertise in questions of confidentiality in the academic peer review process. In October 1981, the Board of Directors of ACE adopted a policy statement on the role of confidentiality in faculty personnel matters. App., *infra*, 1a-4a. The statement, which was drafted for the Board by a Committee on Confidentiality comprised of college and university presidents from a diverse range of public and private institutions, makes clear that confidentiality is critical to the peer review process. The peer review process, in turn, is an essential component of tenure decision-making at postsecondary institutions.

The decision below, which provides no protection to peer reviews whenever a tenure decision is challenged under Title VII, poses a substantial threat to confidentiality and will have a seriously detrimental impact on the existing peer review tenure system at American colleges and universities. ACE fully supports the goals of equal opportunity and condemns discrimination in higher education. ACE in no way wishes to impede the legitimate efforts of the EEOC in investigating claims of discrimination. ACE believes, however, that the important goals of Title VII can be achieved without having to jeopardize needlessly the integrity of peer review and the tenure system, which are vital to all institutions of higher education and elsewhere. Accordingly, ACE wishes to present its views to the Court concerning the implications of the decision below for postsecondary educational institutions and academic freedom and to assist the Court in fashioning an approach that more properly balances the competing interests than does the decision of the Third Circuit in this case.¹

¹ Pursuant to Rule 36 of the Rules of this Court, ACE has obtained the consent of the parties to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether the Equal Employment Opportunity Commission ("EEOC"), in investigating a claim of employment discrimination by a faculty member denied tenure by a university,² may compel disclosure of confidential peer review materials by the university without any weight being given to the First Amendment interests at stake. The court below has held that those interests are entitled to no protection.

This case arises from a claim filed with the EEOC by a former associate professor in the Management Department of the University of Pennsylvania Wharton School of Business. The complainant, Rosalie Tung, alleged that she had been denied tenure based on her sex and national origin. In conjunction with its investigation of the claim, the EEOC submitted numerous requests for information to the University of Pennsylvania. The University voluntarily cooperated with every EEOC request except for one, which sought production of confidential peer review documents pertaining to Ms. Tung and to five male faculty members.

The EEOC insisted that it was entitled to immediate access to the confidential peer review documents without having to make any showing specific to Ms. Tung's claim. Accordingly, the EEOC—without undertaking any review of the voluminous materials already produced by the University—issued a subpoena *duces tecum*. The University petitioned the EEOC to modify the subpoena to recognize and protect the confidentiality of its peer review materials. The EEOC rejected the request. Instead, on June 19, 1987, it filed an action in the United States District Court for the Eastern District of Pennsylvania to enforce the subpoena. The court ordered the

² The terms "university," "college" and "institution" are used interchangeably throughout this brief to refer to postsecondary educational institutions.

production. In so doing, it dismissed the University's First Amendment defense as an "improper response to an application to enforce an administrative subpoena." Order, *EEOC v. University of Pennsylvania*, Misc. No. 87-0294 (E.D. Pa. Sept. 1, 1987).

The court of appeals affirmed, solely on the basis of its prior decision in *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986). In *Franklin & Marshall*, the court held that Franklin and Marshall College was required to produce all confidential peer review materials upon a showing that they were potentially "relevant" to an EEOC investigation. *Id.* at 111. Although the court of appeals in this case acknowledged the First Amendment interests at stake, it refused to give any weight to those interests or require even a minimal showing of a reason specific to Ms. Tung's claim to justify ordering production of the University's confidential documents.

The refusal of the court of appeals to accord peer review materials any measure of confidentiality poses a direct threat to academic freedom, which is protected by the First Amendment. Academic freedom has two components—an individual component—which protects the rights of faculty members to research, publish and teach—and an institutional component—which protects the rights of universities to autonomous decision-making.

The decision below most immediately threatens the institutional component of academic freedom because it directly interferes with the university's decision concerning "who may teach," one of the four essential freedoms of the university identified by Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). The primary means by which the university determines "who may teach" is the tenure system. It is by its tenure decisions that the university essentially defines itself, which is at the core of the freedom of association.

The tenure decision requires careful and candid peer review of the candidate to ensure that only the most highly qualified members of the profession are accorded the extraordinary protection of a lifetime academic position. But without an assurance of confidentiality, peer reviewers will be less candid in their evaluations or may even decline completely to review a candidate. In either event, peer review can no longer be as effective in assisting the tenure decision-making process as it has been for centuries. The decline in quality will be widely felt. Scholarship and instruction will suffer, to the detriment of the university, its faculty and students and society as a whole.

In fact, disclosure of confidential peer review materials may be entirely unnecessary in many discrimination investigations by the EEOC. Numerous other documents and additional information are relied upon and compiled in the course of a tenure decision and can be provided by the university without violating the First Amendment rights recognized by the court below. A preliminary assessment of such other readily available information to ascertain whether there is any reason to doubt that the tenure decision was made on the basis of the candidate's qualifications clearly is appropriate before disclosure of highly confidential information is ordered. ACE does not contend that disclosure never will be justified or warranted. In many instances, the initial examination into non-confidential information will demonstrate that a look at confidential materials is warranted. Nevertheless, before that disclosure is required, some consideration of need must be made to reduce the instances in which the federal government is permitted to "intervene in [to] the intellectual life of the university." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

ARGUMENT

I. PEER REVIEW MATERIALS GENERATED DURING THE ACADEMIC TENURE REVIEW PROCESS ARE PROTECTED UNDER THE FIRST AMENDMENT.

A. Academic Freedom Including The Associational Interest Of The Institution In Autonomy Is Protected By The First Amendment.

This Court previously has recognized in a variety of settings the social importance of academic freedom and the need to protect it from government interference. For instance, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Court stated that “[t]he essentiality of freedom in the community of American universities is almost self-evident To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.” In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), this Court observed that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” It is because of the central role of the university to the intellectual development of the nation that the Court in *Keyishian* held that academic freedom is “a special concern of the First Amendment.” *Id.* The Court reasoned that the First Amendment interest in protecting academic freedom is particularly strong because the “classroom is peculiarly the ‘marketplace of ideas.’” *Id.* And, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), the Court reaffirmed this principle, stating that “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”

There is more to the concept of academic freedom as recognized in this Court’s decisions than mere homilies of respect. The right has consistently been recognized as a significant source of protection from unwarranted governmental interference into the affairs of academia. At its

core, academic freedom has “two strands”—individual and institutional.³ Individual academic freedom encompasses the rights of faculty members in research, publishing and teaching. Institutional academic freedom encompasses the rights of colleges and universities to autonomy.

Sweezy v. New Hampshire was the first case in which this Court recognized and acted to protect academic freedom.⁴ In *Sweezy*, the Court reversed the conviction of a professor who refused to respond to questions by the State regarding his political beliefs. The Court held that the conviction invaded the professor’s liberty “in the areas of academic freedom and political expression.” 354 U.S. at 250. Although the Court’s focus was upon individual academic freedom, both the majority and Justice Frankfurter, in a concurring opinion, acknowledged the institutional component of the right. Chief Justice Warren, writing for the majority, emphasized “[t]he essentiality of freedom in the community of American universities,” which he described as “almost self-evident.” *Id.* Justice Frankfurter, joined by Justice Harlan, discussed the subject more extensively and emphasized the need for the “exclusion of governmental intervention in the intellectual life of a university.” *Id.* at 262. In this regard, he identified the “four essential freedoms” of a university—to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Id.* at 263.

Ten years later, the Court addressed academic freedom again, in *Keyishian v. Board of Regents*. At issue was a

³ See Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Calif. L. Rev. 1538, 1546 (1981).

⁴ Individual Justices previously had discussed the constitutional right to academic freedom in *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring), and *Adler v. Board of Education*, 342 U.S. 485, 510-11 (1952) (Douglas, J., dissenting).

state statute that required faculty members to certify that they had never belonged to the Communist Party. The Court recognized the legitimacy of the State's "interest in protecting its education system from subversion," 385 U.S. at 602, but struck down the statute. In doing so, the Court emphasized the importance of institutional autonomy in the decision of "who may teach," stating that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritarian selection.'" *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

Regents v. Bakke, which followed a decade later, directly implicated the institutional component of academic freedom. In striking down an affirmative-action medical school admissions program, the Court nevertheless accorded substantial deference to the institution's right to determine "who shall be admitted to study." 438 U.S. at 311-13. As support for this analysis, Justice Powell cited Justice Frankfurter's "four essential freedoms." In his decisive opinion, Justice Powell reaffirmed the "national commitment to the safeguarding of these freedoms within university communities [as] emphasized in *Keyishian v. Board of Regents*." *Id.* at 312.

Most recently, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court again recognized the importance of institutional autonomy and the need to protect the decisions of universities from outside influence. The Court considered and rejected a student's claim that his dismissal from a joint undergraduate and medical degree program at a public university violated his due process rights. In refusing to "trench on the prerogatives" of the institution, the Court noted its "responsibility to safeguard [the institution's] academic freedom, 'a special concern of the First Amendment.'" *Id.* at 226 (citing *Keyishian*, 385 U.S. at 603). The Court

expressly noted that academic freedom "thrives," in part, "on autonomous decisionmaking by the academy itself." *Id.* at 226 n.12.

The decisions of this Court and the experience of the academic community demonstrate that the institutional component of academic freedom is essential to continued innovation and excellence. The freedom of individual faculty members to research, publish and teach cannot exist in a vacuum. The freedom of the university—as an institution—provides an environment where individual academic freedom can thrive. As the American Association of University Professors ("AAUP") stated in its "Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments" (1980), reprinted in *Academe: Bulletin of the AAUP* 27 (Feb.-Mar. 1981) ("AAUP Preliminary Statement"), "individuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance." In sum, it is simply too late in the day to doubt that universities are entitled to a measure of autonomy from governmental interference that is derived from the First Amendment.

B. The Tenure System Is An Essential Element Of Institutional Autonomy Protected By The First Amendment.

It is not surprising that the first freedom of institutional autonomy identified by Justice Frankfurter in his *Sweezy* concurrence is the choice of "who may teach." Colleges and universities are defined in substantial measure by their faculty. Thus, any rule of law which affects the manner in which the faculty is selected can have a substantial effect on how that institution defines itself. The impact of unwarranted interference with the faculty selection process of a university can be particularly severe because of the widespread use of tenure as the means of encouraging the relatively small number of exceptionally

well qualified faculty to join and remain contributing members of the university. Thus, a poorly considered tenure decision will have consequences for the institution for years to come.

The tenure system stands at the crossroads of institutional and individual academic freedom. The tenure decision is among the most—if it is not the most—important of the decisions made by a university. As a panel at the University of Chicago observed, the critical function of tenure is to bring to the academic staff of the university “individuals who will carry on research and teaching at the highest level and who will contribute to the intellectual community of the University.” “Report of the Committee on Confidentiality in Matters of Faculty Appointment,” U. Chi. Rec. 165 (May 22, 1979) (“University of Chicago Report”). Thus, the tenure system, by ensuring individuals academic freedom, allows the institution to attract and keep the most highly qualified and valued faculty members. Tenure decisions determine, to a very large extent, the character and quality of the institution’s courses of study. Tenure allows individual scholars who are awarded tenure the freedom to pursue independent and sometimes controversial lines of academic inquiry and to take public positions without concern for jeopardizing their employment. Thus, tenure protects the scholar, and the pursuit of truth, from being confined to popular positions. As such, the tenure decision is widely viewed as the bulwark of academic freedom. See American Association of University Professors, “Academic Freedom and Tenure, 1940 Statement of Principles and Interpretive Comments,” reprinted in *AAUP Policy Documents & Reports* 3 (Washington, D.C. 1984).⁹

⁹ The 1940 Statement of Principles and the Interpretive Comments, which were added in 1970, were developed by the AAUP and the Association of American Colleges. They have been endorsed by over 100 educational and scholarly research associations.

C. Confidential Peer Review Is Essential To The Tenure Decision.

1. The tenure decision is based upon a careful scrutiny of each candidate’s past work and of educated assessment of the candidate’s likely future contributions to scholarship. University of Chicago Report at 167. A thorough and careful assessment of the candidate’s scholarship is the hallmark of the permanent appointive process. *Id.* Essential to that assessment is peer review. As the Seventh Circuit observed in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983),

It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation’s colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate’s academic qualifications.

See also *Kunda v. Muhlenberg College*, 621 F.2d 532, 547-48 (3d Cir. 1980); University of Chicago Report at 167; Letter to Dr. Phillip A. Griffiths, Provost, Duke University, from Provost’s Committee on Academic Policy and Faculty Review at 1 (Mar. 10, 1988) (“Duke Report”).

Evaluations of a candidate’s scholarship and academic promise are solicited from peers who are both inside and outside the institution. Given the importance of the tenure decision to the individual and to the university, the review must be careful and deliberate. It requires reviewing the quality and quantity of the candidate’s work and evaluating thoughtfully the candidate’s scholarship. Thus, the work required of each reviewer is difficult and requires a substantial commitment of time and energy. See “Report of the Committee for the External Review of the Rutgers University Promotion Process” at 13 (Aug. 1987) (“Rutgers Report”); Duke Report at 1.

Inside peer reviewers, to be helpful, must do more than summarize a candidate's work product; they must also undertake "a careful consideration of the candidate's teaching ability, both in the classroom and seminars and in the guiding of graduate students' research. Information about the candidate's contribution to the intellectual activity of the universities where he or she has worked is also taken into account." University of Chicago Report at 167. The final product is transmitted to the tenure decision maker (usually a faculty committee) in letter form.

Only peers who work in the same discipline or on related scholarly topics are competent to evaluate the quality and accuracy of a candidate's writings. University of Chicago Report at 167; Rutgers Report at 3. Even in a large department, only one or two other scholars will be working on related topics. While other colleagues in a department may have opinions about the importance of the specialized field and some general understanding concerning the critical issues and leading scholarship, they will not be the best evaluators of how the tenure candidate's work compares to that of other specialists. "The assessment of a candidate's intellectual and academic qualifications cannot be made by persons who are not similarly qualified; the relative merits of different candidates cannot be assessed by persons who do not know the literature of the subject and whose intellectual experience does not permit them to render a competent judgment." University of Chicago Report at 167.

Those requested to evaluate candidates typically are the best in their profession or area of expertise and therefore have many competing demands on their time. With rare exceptions, peer review is performed without a fee, based upon a shared sense of professional obligation. Duke Report at 1; Rutgers Report at 13. Nevertheless, outside letters of review are crucial to ensure that scholars with expertise in the candidate's area of specialization can evaluate the candidate's contributions.

Outside reviews also provide an external perspective on the candidate and operate as a check on the institution's internal decision-making process. In addition, they are less likely than inside reviews to reflect internal political pressures. But access to outside evaluations is not unlimited. Given the diversity of specialties in modern scholarship, the number of potential evaluators in any one case can be extremely limited. For example, in the departments of history of top American universities, there are no more than five tenured professors with expertise in such fields as Scandinavian, Byzantine, Caribbean, Celtic and American Western history.⁶

2. It is reasonably certain that the holding below that heretofore confidential peer review materials are freely discoverable under a broad relevance standard will significantly alter the peer review process in a way that will damage the tenure system. Confidentiality is universally considered to encourage candor and openness in the evaluation of individuals under review. American Council on Education, "Confidentiality of College and University Faculty Review Files: Its Appropriate Role in Institution Affairs," *Self-Regulation Initiatives: Guidelines for Colleges and Universities* No. 7 at 1 (Dec. 1981) ("ACE Guidelines on Confidentiality") (App., *infra*, 2a). See also Duke Report at 2, citing statement by Norman Bradburn, Provost of the University of Chicago. This Court has recognized the importance of confidentiality to decision-making in a number of contexts, such as petit jury deliberations, *Clark v. United States*, 289 U.S. 1, 13 (1933), governmental deliberations, *United States v. Nixon*, 418 U.S. 683, 705 (1974), and grand jury investigations, *Pittsburgh Plate Glass Co. v. United States*,

⁶ Information pertaining to areas of expertise are self-professed by the faculty members as reported in the American Historical Association Institution Services Program, *Guide to Departments of History 1988-89* (1988).

360 U.S. 395, 400 (1959). In according confidentiality to grand jury transcripts, this Court also acknowledged secrecy's importance in eliciting truthful, candid statements. *Pittsburgh Plate Glass Co.*, 360 U.S. at 400; *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979).⁷

Confidentiality is just as important to peer review and internal tenure decisions as it is to other sensitive decisions. As the University of Chicago Report observed:

Nowhere is the expectation of confidentiality more important than in the appointive process. Because members must work with one another as peers over a number of years, and in the case of tenure appointments perhaps over a number of decades, the utmost candor is essential in the evaluative process. Once a decision is reached, those who opposed as well as those who supported the decision must join together to carry it out.

University of Chicago Report at 166. The ACE Guidelines on Confidentiality similarly observe that "when evaluations are full and honest, and when personalities are not at issue, the relaying of useful information to faculty members under review is expedited and potentially far more effective than it can be when evaluations are unavailable or less candid or less precise." App., *infra*, 3a. Confidentiality promotes intellectual excellence by allowing candor without injury to feeling and supportive praise without inflation of ego. Moreover, confidentiality permits adverse criticism and positive advocacy in a way that allows either to be objectively assessed and, if necessary, discounted. *Id.* It is for these

⁷ As the Court observed in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), Congress, in adopting Exemption 5 to the Freedom of Information Act, found that "'frank discussion of legal or policy matters' in writing might be inhibited if the discussions were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result."

reasons that, traditionally, peer review has been solicited with an explicit, or implicit but plain, assurance of confidentiality. See Duke Report at 2.

Any holding that jeopardizes confidentiality in the peer review and deliberative processes of the academic tenure system will undermine that system in at least three ways. First, it will modify significantly what inside reviewers are willing to write down about the tenure candidate for fear of creating divisions within the department; second, it will deter many outside evaluators from performing peer review; and third, it will inhibit the free and open exchange among faculty members of the tenure decision-making body. In other words, without any assurance of confidentiality in the event a Title VII complaint is filed, the tenure system will be significantly harmed.

Disclosure of negative comments contained in inside reviews would "place an intolerable strain upon relations among colleagues," University of Chicago Report at 168, and create a divisiveness that would inhibit the "robust exchange of ideas" among faculty. Calif. L. Rev. at 1552. Thus, if confidentiality of inside reviews cannot be assured, inside reviewers, seeking to avoid generating ill-will on the part of the candidate, who is, after all a peer,⁸ will be less detailed in their critical assessments. Many will be couched in euphemisms. Thus, the evaluations, especially their negative aspects, will become distorted.

With respect to outside reviewers, the impact may be even more profound. Given that peer review is non-

⁸ The promotion process in academia is completely unlike that in business or industry, where evaluations and decisions are by supervisors, not peers. University of Chicago Report at 168; Calif. L. Rev. at 1552. In fact, this Court has recognized the distinctions between academic institutions and business or industrial entities in *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980) (citing *Syracuse University*, 204 NLRB 641, 643 (1973)), where it observed that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"

compulsory, at least some, and perhaps many, outside evaluators will simply choose not to participate if confidentiality cannot be assured. The risk of disclosure combined with the burden of work create an overwhelming incentive not to participate. Of course, even those who do provide information will almost certainly alter the evaluations they would offer if accorded with a meaningful assurance of confidentiality.

The decision-makers will be handicapped in their deliberations if they cannot rely on written peer reviews. Moreover, the deliberations themselves will be chilled by fear of disclosure. As the University of Chicago Report observed,

Confidentiality of the deliberations by members of the deliberative body and by those within the University to whom recommendations are transmitted is necessary to maintain the mutual trust and respect necessary for effective self-government of a university organized on a collegial basis It is precisely the belief that things said or written are shared only with members of the collegium in arriving at a decision that encourages the members to discuss the matters at hand with the fullest candor and to accept the decision after it has been reached.

University of Chicago Report at 165-166. The end result will be a breakdown of the tenure system and ill-founded tenure decisions that impair the quality of instruction and scholarship. Because a faculty member granted tenure generally remains on the faculty until retirement, the effects of a tenure decision are felt for decades, by the institution, its students, and society as a whole. An inappropriate award of tenure saddles an institution and its students, as well as the field of knowledge, with a professor who contributes less than society needs or has a right to expect from that position and denies all concerned the benefits of an appropriate appointment. "This in turn will stifle the search for knowledge and the exchange of ideas—the core of academic freedom." Calif. L. Rev. at 1552.

Ironically, if the Court requires ready disclosures, the precise effect sought to be avoided by discovery—shielding the basis for the tenure decision—may result. One consequence of nonconfidential peer review might be the development of an informal system of review. "As peer evaluations and tenure recommendations become less reliable, university decisionmakers may be forced to resort to oral and undocumented evaluations that are not subject to the procedural safeguards of the formal system. This would be unfortunate, since this formal system has been designed to maximize accuracy and fairness." Calif. L. Rev. at 1552. We observed in our ACE Guidelines on Confidentiality that a

[f]air and searching assessment of colleagues is the surest guarantee of professional advancement on authentic grounds Without the assurance of confidentiality, higher education may risk a revival of appointment and advancement processes that rely primarily on informal conversations and oral evaluations which are a potentially deeply-discriminatory means of evaluation that current promotion and tenure processes and public laws are, in fact, intended to expunge.⁹ App., *infra*, 3a.

See also Chronicle of Higher Education, Sept. 29, 1980, at 24, col. 2-3 (letter from Professor David Reisman

⁹ Section 709(e) of the Civil Rights Act (codified at 42 U.S.C. §§ 2000e *et seq.*) prohibits information furnished to the EEOC in conjunction with an investigation from being made public. It is not just public disclosure, however, that would have the chilling effect just described. As the Seventh Circuit recognized in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337 n.2 (7th Cir. 1983), and as the foregoing discussion makes clear, disclosure to the EEOC alone would be disabling. Moreover, once information is disclosed to the EEOC in conjunction with an investigation, disclosure to the candidate in question, and even wider disclosure, could easily follow. In fact, this Court held in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), that the EEOC is not prohibited from disclosing the contents of its investigatory files to the candidate during the investigation.

of Harvard University stating that "when confidentiality in recommendations for promotion or tenure is no longer in force, the [informal telephone] networks already in place have more chance to operate in private and (if necessary) in off-campus settings, rather than with the sense of responsibility of committee members"; Duke Report at 2.

Against this background, the approach of the Third Circuit is plainly one-sided. It is not an adequate analysis of the relevant interests which compete in a Title VII challenge to a tenure decision to hold that the EEOC is entitled to all confidential information that may be relevant. Instead, the confidentiality of the tenure review files should be respected unless there is some shown reason to examine the files in a particular case. Because, as we show below, no real need exists in all instances, the absolutist position of the court of appeals is grossly over-inclusive and therefore inconsistent with fundamental principles underlying the First Amendment.

II. RESORT TO PEER REVIEW MATERIALS IN MANY DISCRIMINATION CLAIM INVESTIGATIONS IS UNNECESSARY.

Peer review letters are by no means the only basis for a tenure decision. In fact, a tenure decision may be based entirely on other information. That would be the case where, for example, tenure is denied based upon poor classroom performance. Where the university's statement of reasons for denial of tenure makes this clear, resort to outside peer review materials is completely unwarranted.

Numerous documents and information other than peer review material are considered in the tenure decision, and disclosure of that information in no way threatens academic freedom and ordinarily does not infringe First Amendment rights in the way that disclosure of peer review material does. In addition, other comparative in-

formation can be generated by the institution. Accordingly, institutions have cooperated with the EEOC in producing extensive information, as did the University of Pennsylvania in this case,¹⁰ including information on tenure and other career decisions regarding other members of the Wharton faculty.¹¹

Resort to confidential peer review materials without even a preliminary evaluation of the claim at issue based upon voluntarily provided information is especially offensive.¹² This Court held in *Keyishian v. Board of Regents*,

¹⁰ The University produced most of Ms. Tung's tenure review file including her curriculum vitae, list of publications, statements of past accomplishments and future goals, teaching evaluations, and description of articles published. In addition, it produced her complete personnel file, two detailed position statements describing its tenure review process and its treatment of Ms. Tung's candidacy, a statement of reasons for denial of tenure to Ms. Tung by the Chairman of the Personnel Committee, and the names of the members of the Management Department Tenure Committee and the Personnel Committee.

¹¹ The University provided a number of charts showing: candidates considered by the Wharton School by sex, race, national origin, rank, department and action taken with respect to each; appointments to full professor at the Wharton School by department, sex, race and national origin; salaries and salary increases for associate professors at the Wharton School by national origin; and the number of evaluation letters solicited on behalf of candidates for tenure in the Management Department. The University produced other tenure-related material, as well, including a summary of applications for Management Department positions by race, sex and national origin, sections from the faculty handbook regarding the faculty structure, tenure review process and grievance process, a description of its policies on faculty salary merit increases, and information on vacancies, advertisements, and recruiting for positions at the Wharton School.

¹² *Amicus* Harvard College has filed its own brief proposing generally how to resolve the tension between the EEOC's interest in disclosure and the university's First Amendment interest in the confidentiality of academic peer review materials. Brief of Harvard University as *Amicus Curiae* at 24-25 ("Harvard Brief"). While

in striking down a state statute that infringed on academic freedom, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 385 U.S. at 603 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)). As the University of Chicago Report observed:

In a free society, no governmental investigation can have as its object the truth at any cost; otherwise, unreasonable searches and seizures would be legitimate. In every case, the responsible investigator

amicus ACE agrees with much of the discussion in Harvard's brief, particularly its analysis of tenure and the importance of confidentiality to tenure decisions. ACE takes issue with Harvard's suggestion that redaction—or deletion of names—from confidential peer review documents properly resolves the balance of interests for all academic institutions. Harvard's proposal rests on the assumptions that: (1) the EEOC always will require access to confidential peer review documents to determine whether a claim of discrimination has any basis (Harvard Brief at 24); and (2) the process of redacting names from confidential peer review documents sufficiently protects confidentiality and "minimizes" the injury to a university's First Amendment rights. *Id.* at 23-24. Neither assumption is valid in all situations.

First, in many instances, the EEOC will be able to make a determination whether to go forward without any disclosure of confidential information. If, for example, the university demonstrated that a recommendation against tenure was based on a fully documented lack of teaching ability or violation of the university's policy against sexual harassment, resort to peer review materials would be unnecessary. Harvard itself seems to recognize as much. See Harvard Brief at 24 n.6. Second, the standard proposed is neither feasible nor appropriate for many American universities in a substantial number of cases. The use of redaction alone is particularly inadequate in cases involving small institutions or narrow areas of specialty where the identities of authors and subjects readily may be determined from the style, tone or substance of the comments. At bottom, ACE believes that redaction is an important consideration once some reason to require disclosure is presented by the EEOC. But, the proper approach still must be to require the EEOC to review all non-confidential information and demonstrate—on a case-by-case basis—what additional substantive information likely will further its investigation.

balances the need for the information (including the availability of alternative modes of obtaining it) against the harm produced by the investigation to important rights of individuals and institutions.

University of Chicago Report at 167.

ACE has previously urged that efforts be made to limit the scope of any investigation to what is reasonable "to avoid needless proliferation of disclosure, unnecessary duplication of documents, and any investigational action that would impair the functioning of the institution." App., *infra*, 2a. The AAUP, in its Preliminary Statement, agrees:

We believe it inappropriate for a court to compel disclosure of the actions and motivations of the individual participants in a nonrenewal decision without first weighing the facts and circumstances asserted by the complainant. A judgment must then follow that those facts and circumstances raise a sufficient inference that some impermissible consideration was likely to have played a role to overcome the presumption in favor of the integrity of the academic process.

AAUP Preliminary Statement at 27. In fact, the EEOC's own Compliance Manual directs EEOC investigators to seek reasonable accommodations between the EEOC's need for information and objections by the party from whom the information is sought. The manual expressly notes "[a]s the investigation develops, other evidence may eliminate the need for the requested information." 1 *EEOC Compliance Manual* (BNA) § 24.1(a) (Feb. 1988). Thus, the EEOC's own internal guidelines are at odds with the absolutist approach adopted by the court of appeals.

The AAUP Preliminary Statement identifies factors that can be weighed prior to seeking disclosure of peer review materials, which include the adequacy of the procedures employed in the nonrenewal decision, the reasons offered in defense of the decision, and the internal review

procedures, statistical evidence that might give rise to an inference of discrimination, factual assertions or statements that indicate personal bias or prejudices on the part of the participants, the availability of the information from other sources and the importance of the information to the issues presented. AAUP Preliminary Statement at 28. If nothing in this wealth of directly relevant information provides substantial (or even any) support for the claim of discrimination, it is difficult to believe that any Title VII purpose will in fact be served by granting the EEOC access to the confidential tenure materials. Certainly it is counterintuitive to believe that there would be very many, if any, situations where the only evidence of discrimination will be in the confidential letters. For that reason, withholding their disclosure when nothing else supports the claim will not impair the EEOC's vital role in investigating discriminatory employment decisions.

ACE does not equate confidentiality with secrecy. It does not contend that there never will be instances in which resort to confidential peer review materials will be necessary and appropriate in the context of an EEOC investigation. We do maintain, however, that resort to and disclosure of confidential peer review materials in every instance and as a matter of course will never be necessary or appropriate.¹³ To the contrary, such a policy or practice is a violation of First Amendment principles that cannot be tolerated.

¹³ A rule of unrestricted disclosure also may encourage the complaining party to file a charge in the hope of finding something in the confidential materials that might embarrass the university or peer reviewers on grounds wholly unrelated to any Title VII action. Placing at least some minimal burden on the EEOC will eliminate this perverse incentive for filing baseless Title VII charges.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

SHELDON ELLIOT STEINBACH *
AMERICAN COUNCIL
ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036-1193
(202) 939-9355

Counsel for Amicus Curiae

* Counsel of Record

June 23, 1989

APPENDIX

APPENDIX

SELF-REGULATION INITIATIVES:

Guidelines for Colleges and Universities

No. 7

December 1981

Confidentiality of College and University
Faculty Personnel Files: Its Appropriate Role
in Institutional Affairs

American colleges and universities are dedicated to sustaining and fostering the values of equity of human treatment, equal opportunity of access, collegiality of spirit in association, academic freedom, and intellectual excellence. Within the complex context of the values of academic life in the many educational institutions devoted to these principles, the difficult issue of confidentiality can arise in conjunction with faculty appointments and promotions. "Confidentiality," as used in this statement, refers to the protection of statements and other such evaluative materials, as well as the identities of authors of letters in deliberations concerning the appointment, promotion, and granting of tenure to faculty members.

Institutions have long based the appointment and advancement of faculty members on academic qualifications described rigorously in evaluations of an individual candidate's work by academic peers inside and/or outside the institution. At many institutions these evaluations, provided without fee as a professional duty, are submitted in confidence. They are made available for inspection only to those legitimately involved in the faculty appointment or review process. For these institutions, one concern surrounding confidentiality is that within these various processes any faculty member, from within the institution or from another institution, who is asked to evaluate a colleague should have the assurance that

the particulars of his or her judgments will be held in confidence and will not be made available to anyone except those duly elected or appointed to participate at some level of the review.

We wish at the outset to state clearly that confidentiality is not secrecy. There are three general principles which accompany confidentiality and assure its correct application:

The procedures by which academic judgments are made must be public so that candidates and members of educational communities generally can be assured that the processes of evaluation provide for a full and fair review of candidates' qualifications.

An avenue for redress must be available if improprieties in the process are believed to have occurred. Candidates for faculty advancement should be afforded the opportunity to know and to benefit from the deliberation of peers.

Although appointment and promotion procedures will clearly differ from institution to institution and will vary in accordance with any collective bargaining agreement, such procedures for evaluation in institutions of higher education should ensure that these three principles are incorporated in the review process.

As part of the procedures for making responsible decisions about faculty appointments, all institutions have a clear obligation to obtain objective information and candid appraisals of candidates. Most educators believe that confidentiality encourages candor and openness in the evaluation of individuals under review and therefore is crucial to that process:

Confidentiality can strengthen professional equity of treatment as distinct from results achieved through favoritism or popularity.

Confidentiality need not be contrary to equality of opportunity when it allows supportive assertion of

considerations properly weighed in particular cases with all other relevant factors.

Confidentiality can promote intellectual excellence, when it allows candor without injury to feeling, and supportive praise without inflation of esteem. It can permit adverse criticism and positive advocacy in a way that allows either to be objectively assessed and, if necessary, discounted.

Fair and searching assessment of colleagues is the surest guarantee of professional advancement on authentic grounds, for when evaluations are full and honest, and when personalities are not at issue, the relaying of useful information to faculty members under review is expedited and potentially far more effective than it can be when evaluations are unavailable or less candid or less precise. Without the assurance of confidentiality, higher education may risk a revival of appointment and advancement processes that rely primarily on informal conversations and oral evaluations which are a potentially deeply-discriminatory means of evaluation that current promotion and tenure processes and public laws are, in fact, intended to expunge.

We recognize that confidentiality is not absolute. In many instances disclosure of confidential information is sought by individuals under review. When that occurs significant public interest must be weighed—the protection of individual rights and the preservation of procedures which depend upon confidentiality for their effectiveness and fairness. Thus, the interests of the individual seeking disclosure of information held in confidence must be balanced against the interests of institutions of higher education in maintaining equity and quality.

Because institutions of higher education are being asked with increasing frequency to disclose confidential information, they should make efforts to define the scope of investigation so that it be limited to what is reasonably

necessary to shed significant light upon the matter under investigation. At the same time they should make clear to federal officials the need to avoid needless proliferation of disclosure, unnecessary duplication of documents, and any investigational action that would impair the functioning of the institution.¹

We believe that confidentiality protects the rigor and dispassion of judgments rendered in promotion of faculty; and that confidentiality can be effectively exercised within the sturdy texture of academic custom and with proper permeability to the law.

We are therefore committed to the preservation of confidentiality within the review process at those institutions which honor it, and which, in so doing, honor the principles of equity, equal opportunity, collegiality, academic freedom, and intellectual excellence.

ACE Committee on Confidentiality
October 1981

American Council on Education
One Dupont Circle, Washington, D.C. 20036

¹ For one presentation of guidelines regarding access to confidential information, the reader may wish to see the "1979 Report of the Committee on Confidentiality in Matters of Faculty Appointment," *The University of Chicago Record*, May 22, 1979, pp. 165-170.

AMICUS CURIAE

BRIEF

JUN 23 1989

JOSEPH F. SPANIOL, JR.

In The
Supreme Court of the United States
October Term, 1988

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF OF STANFORD UNIVERSITY, YALE
UNIVERSITY AND PRINCETON UNIVERSITY AS
AMICI CURIAE IN SUPPORT OF PETITIONER

STEVEN L. MAYER*
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
3 Embarcadero Ctr., 7th Floor
San Francisco, CA 94111
415/434-1600

JOHN J. SCHWARTZ
IRIS BREST
SUSAN K. HOERGER
OFFICE OF THE VICE PRESIDENT
AND GENERAL COUNSEL
STANFORD UNIVERSITY
P.O. Box N
Stanford, CA 94305
415/723-3761

*Attorneys for Amicus Curiae
Stanford University*

DOROTHY ROBINSON
OFFICE OF THE GENERAL
COUNSEL
YALE UNIVERSITY
New Haven, CT 06520
203/432-4949

*Attorney for Amicus Curiae
Yale University*

THOMAS H. WRIGHT JR.
OFFICE OF THE VICE PRESIDENT,
GENERAL COUNSEL & SECRETARY
PRINCETON UNIVERSITY
318 Nassau Hall
Princeton, NJ 08540
609/452-5560

*Attorney for Amicus Curiae
Princeton University*

*Counsel of Record

1989

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of <i>Amici Curiae</i>	1
Summary of Argument	2
Argument	4
I. EFFECTIVE TENURE EVALUATION PRO- CEDURES PROMOTE ACADEMIC FREE- DOM	4
A. The Importance of the Tenure Decision ...	4
B. The Critical Role of Candid Peer Review..	6
II. THE FIRST AMENDMENT INTEREST IN ACADEMIC FREEDOM REQUIRES A SHOW- ING OF NEED BEFORE THE DISCLOSURE OF CONFIDENTIAL TENURE MATERIALS MAY BE COMPELLED	8
Conclusion	14

TABLE OF AUTHORITIES

	Page
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 211, 223 (1979)	10
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983).....	7, 9, 12
<i>In re Grand Jury Proceedings, Miller Brewing Co.</i> , 687 F.2d at 1090-91 (7th Cir. 1982)	10
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	9, 12
<i>Pittsburgh Plate Glass Co. v. United States</i> , 360 U.S. 395, 400 (1959)	10

INTEREST OF AMICI CURIAE

Amici are universities committed to excellence in teaching and research. Our success is determined by the quality of our tenured faculties, whose members continually explore and expand new intellectual and scientific frontiers. We therefore share a deep common interest in appointing to tenure only the best and most promising scholars. This interest, by definition, excludes from consideration factors which are unrelated to making accurate predictions about the potential for academic excellence. Our interest in making tenure decisions on academic grounds is fully compatible with the goal of Title VII to eliminate arbitrary discrimination in employment based upon improper considerations of sex, race, national origin, religion, or other invidious criteria.

In making tenure decisions, our faculties consider the relative academic achievements and scholarly potential of their peers. To make these judgments, *amici* and comparable institutions rely extensively upon confidential written evaluations solicited from scholars both from our own universities and from the outside academic community. We depend upon these scholars to provide their detailed, frank, and critical opinions of the tenure candidate and others in the field. These candid appraisals are provided with the expectation that they will be held in confidence.

The tenure review process thus implicates the academic freedom of the university making the tenure decision, the academic freedom of the scholars who provide candid information to be used in the process, and the

privacy of other scholars with whom the tenure candidate has been comparatively evaluated.

In the decision below, the Court of Appeals enforced an Equal Employment Opportunity Commission administrative subpoena seeking the production of confidential "peer review" submissions without requiring the EEOC to demonstrate a compelling need for such material. We recognize that the governmental interest in enforcing antidiscrimination laws is substantial. We believe, however, that the rule adopted by the Third Circuit vindicates that interest at the expense of First Amendment rights that leading research universities such as *amici* share with petitioner. Indeed, the rule adopted below threatens the integrity of the tenure processes at *amici* universities and, ultimately, could undermine academic freedom guaranteed by the First Amendment.

Courts of appeal in other circuits have recognized that the government's substantial interest in compelling disclosure of information necessary to investigate allegations of discrimination can readily be accommodated without sacrificing First Amendment rights. We submit this brief to express that view.

SUMMARY OF ARGUMENT

The award of tenure at research universities is based upon a decision that a candidate meets a rigorous standard of academic excellence. To determine whether the standard is met, the tenure review process traditionally depends upon candid assessments of scholarship and promise provided by established academics who are

familiar with the tenure candidate's field. These assessments, provided in confidence, typically compare the candidate with other named scholars. Disclosure of these candid peer reviews therefore has the potential to disrupt harmonious relationships between the evaluator and his or her colleagues throughout the academic community. In addition, the risk of disclosure would inevitably inhibit scholars from providing candid, forthright evaluations of their peers and degrade the quality of the reviews provided.

An *amicus* brief submitted by Harvard University in this matter discusses in Sections I and II the issues of academic freedom and confidentiality, and recognizes the strong national policy to eradicate unlawful employment discrimination. In Section III, Harvard suggests an approach to accommodating these interests when disclosure of confidential materials is sought in a dispute involving a claim of unlawful employment discrimination. We join in Sections I and II of Harvard's brief. We believe, however, that the approach suggested in Section III may not be adequate to preserve the integrity of the tenure review process.

Two circuit courts have devised methods of protecting academic confidentiality while accommodating the need for disclosure of confidential information when necessary to prove a claim of discrimination. The Seventh Circuit has established a qualified academic freedom privilege, and the Second Circuit has applied a balancing test to reach a similar result. This approach, which considers the specific facts and circumstances of each case, is in our view better calculated to safeguard academic freedom while providing needed disclosure.

The following universities and colleges have indicated their general support for the arguments advanced in this brief and join *amici* in urging reversal of the judgment of the Court of Appeals for the Third Circuit:

Baylor University

Bryn Mawr College

Franklin and Marshall College

Rutgers, The State University of New Jersey

The University of California

The University of Texas System

ARGUMENT

I.

EFFECTIVE TENURE EVALUATION PROCEDURES PROMOTE ACADEMIC FREEDOM.

A. The Importance of the Tenure Decision

Amici and comparable research universities grant tenure only to candidates who meet a rigorous standard of excellence. Yale University requires candidates for professorships in its Faculty of Arts and Sciences "to stand in competition with the foremost leaders in their field throughout the world." Yale University, *Faculty Handbook* 29 (November 1986) (copy lodged with the Clerk). Stanford University's School of Humanities and Sciences likewise prescribes that:

"The first criterion for tenure is that the individual has achieved, or gives every promise of achieving, true distinction in scholarship. The published materials must clearly reveal that the person being proposed for tenure is among the very best in the field

today. Thus, it is not sufficient merely to be the best of a particular experience-cohort in the discipline." (Stanford University, Procedures and Criteria for Appointment, Reappointment and Promotion of Faculty in the School of Humanities and Sciences at Stanford 9 (April, 1985)(copy lodged with the Clerk).

Tenure decisions are made only after careful consideration of a candidate's academic potential. This includes scrutiny of what the candidate has so far achieved and, more importantly, includes an informed prediction of what he or she will likely accomplish in the future. The goal is to identify scholars who have that spark of creativity, ingenuity, and intellectual tenacity that experience has proven distinguishes those who are merely very good from those who are outstanding. As the Dean of the Faculty of Princeton University has explained:

"The process of tenure review has the task of assuring the excellence of the faculty well into the future; it must be based to a considerable degree not only on the consideration and assessment of work in the past, but on the assessment of the candidate's likely contributions in the future. The tenure system forces a most serious, and climatic, decision which has consequences far into the future for all concerned." (Affidavit filed with the Supreme Court of the State of New Jersey in *Dixon v. Rutgers*, 110 N.J. 432 (1988).)

Academic freedom, a special concern of the First Amendment, has historically embraced the right of the faculty of the institution to choose their colleagues on the basis of scholarly qualifications, and not by administrative fiat. The award of tenure is an offer of employment until retirement. Since the quality of its faculty is the single greatest determinant of the quality of a university, each tenure decision is crucial for the institution as well

for the individual. When a tenured appointment is made, the university is in effect predicting that the appointee's talent and industry will express themselves in a flow of outstanding scholarly works. If we err, we may well have granted tenure to a competent teacher, who may publish competent articles or books in his or her field – but we will have lost for a working lifetime a position that might have been filled with a truly outstanding scholar. For universities that aspire to be on the cutting edge of knowledge, there is scant leeway for mistakes.

B. The Critical Role of Candid Peer Review

Faculty tenure decisions depend upon the "peer review" process in which the university seeks candid and detailed appraisals of the candidate's scholarly accomplishments and standing from professional peers familiar with the tenure candidate's field of study. The views of scholars and scientists from other universities and research institutions are therefore particularly valuable, especially when (as is almost invariably the case) the candidate is highly specialized in his or her research area and the leading scholars in the field are located at universities throughout the country – and the world. Those appraisals typically compare the tenure candidate with other scholars working in the same academic field, thus enabling the decision-makers to judge how highly the tenure candidate is regarded. Indeed, *amici* expressly solicit the critical comparisons of candidates with others in the field. Appendix A is the text of a sample letter used by Yale University for soliciting such peer review evaluations. Traditionally, peer reviewers understand and

expect that their evaluations will be kept confidential. This is a necessary precondition to their willingness to provide the kind of full and frank advice that is essential to a university which is making a tenure decision.¹

As the Seventh Circuit Court recognized in *E.E.O.C. v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983):

"It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications. [Citation omitted.] Moreover, its is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process." *Id.* at 336.

¹ Most other employers, in contrast, base promotion decisions on the views of supervisors about how the specific employee performs his or her daily work. While a university would easily be able to determine for itself, without recourse to outside reviewers or to any very deep or difficult scrutiny by internal colleagues, whether a faculty member adequately performs his or her specific duties (typically teaching particular courses), that assessment would be inadequate to identify those scholars whose promise merits tenure. Indeed, as the term "peer review" itself suggests, faculty members do not have supervisors in the usual sense; it is the opinions of other scholars within their fields – of their teaching, and especially of their scholarship and research – that will determine their positions in the academic world.

II.

THE FIRST AMENDMENT INTEREST IN ACADEMIC FREEDOM REQUIRES A SHOWING OF NEED BEFORE THE DISCLOSURE OF CONFIDENTIAL TENURE MATERIALS MAY BE COMPELLED

The *amicus* brief filed by Harvard University identifies important underlying concerns in this case. As that brief points out, academic freedom is a special concern of the First Amendment: it secures to society important rights to protect the discovery, imparting, and receiving of knowledge; and it is intimately involved in the tenure review process that determines who may teach at each institution. Unlawful considerations of race, sex, and other invidious criteria have no place in tenure decisions. Without repeating the arguments or citations, we join in Sections I and II of Harvard's brief. We also agree that the interest in combatting discrimination must be pursued without endangering academic freedom. But we do not join in Section III of Harvard's brief, because we believe the approach set out there is not adequate to achieve this end.

The Harvard brief suggests that academic freedom will not be impaired by the disclosure of redacted confidential materials upon a charge or allegation of discrimination. That approach overestimates the effectiveness of redaction as a means to preserve confidentiality.

The Courts of Appeal for the Second and Seventh Circuits have identified ways to preserve academic freedom while accommodating the need for disclosure of confidential information when required to prove claims of unlawful employment discrimination.

In *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), the Second Circuit weighed the plaintiff's interest in disclosure of confidential peer review information (the votes of two of the named defendants on plaintiff's unsuccessful applications for promotion and for reappointment with tenure) against the university's First Amendment interest in academic freedom. In substance, the court prescribed the precondition of a qualified privilege in ruling that routine disclosure of confidential peer review materials will not be ordered in cases in which a disappointed tenure candidate has received upon request a detailed statement specifying the university's reasons for its decision. *Id.* at 908. Disclosure under *Gray* may be available when the university's reasons for its decision rely on confidential tenure review materials. *Id.* at 905. We suggest below that such further disclosure should require that there be some evidence that the reasons the university has articulated are pretextual. While the *Gray* court did not adopt a qualified academic privilege, neither did it reject the idea that such a privilege might be successfully urged in a case with different facts. *Id.* at 908.

In *EEOC v. University of Notre Dame du Lac*, *supra*, 715 F.2d 331, the Seventh Circuit reviewed and reversed a district court order granting enforcement of an administrative subpoena *duces tecum* issued by the EEOC requiring the production of the complete personnel files of the charging party and all other teaching personnel in the University's Economics Department for a specified period of time. The University objected to the subpoena, in part because the files sought "contained peer review evaluations which were made with the assurance and

expectations that the evaluations would remain confidential, and therefore the peer review evaluations were protected from disclosure by a qualified academic privilege." *Id.* at 333. The University of Notre Dame du Lac did not argue that there should be no discovery of confidential peer review information, but only that disclosure should be made in a manner that did not compromise the confidentiality of scholars who had participated in the tenure peer reviews.

The decision of the court established a "qualified academic freedom privilege protecting academic institutions against the disclosure of the names and identities of persons participating in the peer review process."

As envisioned by the Seventh Circuit, disclosure of materials covered by the qualified privilege would be permitted on a case-by-case basis only after a balancing test was applied to "determine whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege." *Id.* at 338, citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d at 1090-91. The balance might tip in favor of the production of privileged information, but only upon a showing of "particularized need" (not mere relevance), and only after thorough and exhaustive discovery of other sources of information. *Id.* at 339.² Moreover, while in that particular

² The Seventh Circuit recognized that even when tenure review material is presented in a manner that protects confidentiality, it is still highly confidential, and that disclosure should be made subject to appropriate protective orders. *Id.* at 340.

case the University of Notre Dame du Lac had voluntarily offered to provide the EEOC with redacted copies of peer review materials, the Seventh Circuit expressly said that its decision was not intended as "an endorsement for granting the EEOC access to redacted files in all instances Clearly there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.* at 337 n. 4.

Amici believe that unlimited access to confidential tenure review materials would destroy our ability to solicit and receive frank, detailed, and critical appraisals of tenure candidates. We believe, further, that a mere claim of relevance by the EEOC or a Title VII plaintiff is insufficient to tip the balance in favor of disclosure of confidential materials. Finally, we believe that any disclosure of confidential peer review material should be carefully tailored to satisfy the legitimate proof requirements of the agency or the plaintiff – that is, not to satisfy remote or speculative ends.

We urge that where a university has upon request provided a disappointed tenure candidate with a meaningful statement of the reasons for its decision, the university's interest in preserving confidentiality will at the outset outweigh the interest of EEOC or the Title VII plaintiff in obtaining confidential materials. When such reasons include reliance upon the content of specific confidential materials, we would expect the statement of reasons to contain a summary of the substance of that material.

Of course, where a plaintiff or charging party has provided evidence that the reasons articulated are pretextual, further disclosure may be required. Even when greater disclosure is justified, we believe that disclosure of confidential materials should be carefully tailored to the actual needs of the EEOC, in view of the claims and defenses presented by the specific case. We further believe that in the vast majority of cases the needs of the EEOC can be satisfied without compromising the confidentiality promised peer reviewers or the privacy of other scholars against whom the candidate is measured.

We note that when a tenure candidate works in a highly specialized area, there will be a limited universe of scholars who have the expertise required to provide informed and useful judgments about the candidate's work, and a limited number of scholars with whom the candidate might reasonably be compared. A candidate given access to the actual letters will doubtless be able to identify the authors, even if names and obvious identifiers are excised. (Idiosyncrasies of style, organization, and syntax will provide important clues.) It is possible, however, to provide a meaningful summary detailing the substance of confidential materials. In most cases such a summary will be adequate to provide the EEOC, or a Title VII litigant, with relevant information concerning the tenure decision without compromising the confidentiality of the referees or the privacy of third parties.

We believe the *Gray* and *Notre Dame* cases are instructive in suggesting acceptable ways in which the interests in pursuing discrimination claims can appropriately be accommodated without impairing academic freedom. We agree with both the Second and Seventh Circuits that

each tenure decision will be unique; the problem of balancing the interests cannot be resolved by establishing an absolute rule of invariable application. Each case is fact driven; and each must be examined individually to assess the need of the EEOC to know the substance of confidential materials, and to weigh that need against the First Amendment interests of academic freedom and privacy. District courts and the EEOC should therefore retain flexibility to fashion disclosure in the manner and to the extent appropriate to the particular case.³

In sum, *amici* and comparable universities and colleges legitimately require the ability to obtain in confidence candid assessments from inside and outside scholars. We believe that ability would be significantly compromised by any routine disclosure of confidential tenure review materials in a manner that would permit the identification of authors or other scholars.

Title VII is a moral as well as a legal imperative and we seek no excuse from its mandate. We do ask that the compelling considerations in favor of protecting the confidentiality of peer review materials be given their weight

³ Not every claim of discrimination implicates the confidential materials in a disappointed tenure candidate's file. While they may not be frequent, there will be cases where the university's articulated reason for denying tenure has nothing to do with the substance of any of the confidential materials in the file. For example, a university may determine it has no programmatic need for a faculty member in the candidate's sub-specialty. In such a case, absent some evidence to support a claim of pretext, there will be no need for the EEOC to know the substance of the confidential materials in the candidate's file.

in deciding on the process by which Title VII concerns will be addressed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded for further proceedings in light of this Court's opinion.

Respectfully submitted,

STEVEN L. MAYER*
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
3 Embarcadero Ctr., 7th Floor
San Francisco, CA 94111
415/434-1600

JOHN J. SCHWARTZ
IRIS BREST
SUSAN K. HOERGER
OFFICE OF THE VICE PRESIDENT
AND GENERAL COUNSEL
STANFORD UNIVERSITY
P.O. Box N
Stanford, CA 94305
415/723-3761

*Attorneys for Amicus Curiae
Stanford University*

*Counsel of Record

Dated: June 23, 1989

DOROTHY ROBINSON
OFFICE OF THE GENERAL
COUNSEL
YALE UNIVERSITY
New Haven, CT 06520
203/432-4949

*Attorney for Amicus Curiae
Yale University*

THOMAS H. WRIGHT JR.
OFFICE OF THE VICE PRESIDENT,
GENERAL COUNSEL & SECRETARY
PRINCETON UNIVERSITY
318 Nassau Hall
Princeton, NJ 08540
609/452-5560

*Attorney for Amicus Curiae
Princeton University*

APPENDIX A

Sample SHORT-LIST letter for a tenured appointment

Dear _____:

The Department of ____ has been conducting a search to identify candidates for a tenured appointment in (*description of field or fields defining the position*). The department would now like your assistance in evaluating candidates for this position. Our final recommendation will be based primarily on the prospects that a candidate will make distinguished contributions to the advancement of knowledge in his or her future scholarly career. However, the candidate's qualities and promise as a teacher, colleague, and university citizen are also important considerations. While recognized achievements to date are essential in estimating future accomplishments, we are prepared to consider all evidence of the potential for significant original research in the case of scholars at earlier stages in their careers.

In preliminary discussions and with the help of experts in the field from other institutions, the following appear to be persons we should be considering:

[List 4-8 in alphabetical order, with present affiliations; include any internal candidates.]

Although we have not asked all of these if they are willing to be considered, they represent the kind and quality of scholar we hope to appoint. We would therefore appreciate your comments on as many as possible of the individuals listed. We are interested in your views of their suitability for appointment to the position and your comparison of their achievements and future promise. We

App. 2

welcome your comments on their respective strengths and weaknesses, as evidenced in their writing, teaching and other activities. In making your comparisons please take into account differences in the professional experience of the individuals.

If you know of other qualified scholars whom we should consider in addition to the names above, please mention them in your comparative evaluations. Since Yale University is an equal opportunity, affirmative action employer, we would be especially grateful if you could bring to our attention any other women or members of minority groups in this area of research and teaching.

Your response will be helpful not only to the professors of this department, but also to the Faculty Committee on Tenured Appointments in the event that the department recommends any of the individuals for appointment.

In behalf of all of us, I wish to thank you in advance for your assistance.

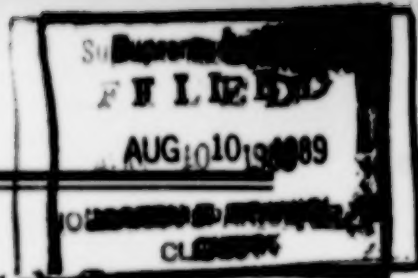
Sincerely yours,

Chair

AMICUS CURIAE

BRIEF

16
No. 88-493



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNIVERSITY OF PENNSYLVANIA,
v. *Petitioner,*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE*
NOW LEGAL DEFENSE AND EDUCATION FUND
AND ROSALIE TUNG, *ET AL.*
IN SUPPORT OF RESPONDENT
(Additional *Amici* Listed on Inside Cover)

Of Counsel
SARAH E. BURNS
NOW Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013

SUSAN DELLER ROSS
MARY DELANO
Sex Discrimination Clinic
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9640

R. BRUCE KEINER, JR.*
LORRAINE B. HALLOWAY
VICTORIA L. EASTUS
SUSAN A. BOOTH
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

August 10, 1989

* Counsel of Record for the
Amici Curiae

AAUW LEGAL ADVOCACY FUND,
AFRICAN AMERICAN ASSOCIATION,
ASIAN PACIFIC AMERICAN LEGAL CENTER
OF SOUTHERN CALIFORNIA,

ASSOCIATION OF WOMEN FACULTY
AND ADMINISTRATORS OF THE
UNIVERSITY OF PENNSYLVANIA,

FEDERATION OF ORGANIZATIONS
FOR PROFESSIONAL WOMEN,

NATIONAL COALITION FOR UNIVERSITIES
IN THE PUBLIC INTEREST,

NATIONAL WOMEN'S LAW CENTER,

NATIONAL WOMEN'S STUDIES ASSOCIATION,

WOMEN'S EQUITY ACTION LEAGUE,

WOMEN'S LEGAL DEFENSE FUND

QUESTION PRESENTED

Whether a university-employer may withhold from the Equal Employment Opportunity Commission documents that could demonstrate whether a challenged tenure decision was based on academic grounds or invidiously discriminatory grounds.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES.....	iv
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE LANGUAGE, HISTORY AND PURPOSE OF TITLE VII MANDATE BROAD EEOC SUBPOENA POWER	4
II. PEER REVIEW MATERIALS ARE ALWAYS RELEVANT WHEN A PARTICULAR TEN- URE DECISION IS CHALLENGED AS DIS- CRIMINATORY	7
III. GRANTING THE EEOC ACCESS TO PEER REVIEW MATERIAL DOES NOT INFRINGE UPON THE UNIVERSITY'S RIGHT TO ACA- DEMIC FREEDOM	12
IV. BECAUSE CONFIDENTIALITY IS NOT ES- SENTIAL TO THE PEER REVIEW PROC- ESS, THIS COURT SHOULD NOT BURDEN THE EEOC BY RECOGNIZING A QUALI- FIED PRIVILEGE.....	17
A. Granting the EEOC access to peer review materials will not impair the University's ability to make sound tenure decisions	18
B. The EEOC's need for the documents it has subpoenaed far outweighs the University's interest in keeping the documents confiden- tial	22
1. The privilege the University seeks will substantially interfere with the EEOC's ability to investigate and eradicate dis- crimination	22
2. A qualified academic freedom privilege will not in fact advance the University's interest	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	5
<i>Barenblatt v. United States</i> , 360 U.S. 109 (1959) ..	12
<i>Board of Directors of Rotary Int'l v. Rotary Club</i> , 481 U.S. 537 (1987)	14
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972) ..19, 21-22, 27-28	
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	5
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	4
<i>Chang v. University of Rhode Island</i> , 606 F. Supp. 1161 (D.R.I. 1985)	10
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	27
<i>In re Dinnan</i> , 661 F.2d 426 (5th Cir. 1981), <i>cert. denied</i> , 457 U.S. 1106 (1982)	17, 19, 29
<i>EEOC v. Franklin & Marshall College</i> , 775 F.2d 110, 114-15 (3d Cir. 1985), <i>cert. denied</i> , 476 U.S. 1163 (1986)	16
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	<i>passim</i>
<i>EEOC v. Tufts Institution of Learning</i> , 421 F. Supp. 152 (D. Mass. 1975)	11
<i>Gray v. Board of Educ., City of New York</i> , 692 F.2d 901 (2d Cir. 1982)	26
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	8-9, 16, 26
<i>Hishon v. King & Spaulding</i> , 467 U.S. 69 (1984) ..	13
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	4, 10
<i>McLaurin v. Okla. State Regents</i> , 339 U.S. 637 (1950)	6, 12
<i>Meredith v. Fair</i> , 305 F.2d 343 (5th Cir. 1962), <i>cert. denied</i> , 371 U.S. 828 (1962)	6, 12
<i>Missouri ex rel. Gaines v. Canada</i> , 305 U.S. 337 (1938)	6, 12
<i>New York State Club Ass'n v. City of New York</i> , 487 U.S. —, 108 S. Ct. 2225 (1988)	14
<i>Paul v. Stanford Univ.</i> , 39 EPD 35,918, 46 Fair Emp. Prac. Cas. (BNA) 1350 (N.D. Cal. 1986) ..	19, 26
<i>Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations</i> , 413 U.S. 376 (1973)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. —, 109 S. Ct. 1775 (1989)	<i>passim</i>
<i>Regents of the Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978)	12, 13
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	13-14
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	12, 15
<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950), <i>reh'g denied</i> , 340 U.S. 846 (1950)	5, 12
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981)	3-4, 9
<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	17-18, 28
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	19, 28
<i>University of California v. Bakke</i> , 438 U.S. 265 (1978)	12, 13
<i>Wards Cove Packing Co. v. Atonio</i> , 490 U.S. —, 109 S. Ct. 2115 (1989)	4, 11
OTHER AUTHORITIES	
118 Cong. Rec. 1993 & 1995 (1972)	14
H.R. Rep. No. 238, 92 Cong., 1st Sess. 20, <i>reprinted in 1972 U.S. Code Cong. & Admin. News</i> 2137, 2155	5
S. Rep. No. 415, 92d Cong., 1st Sess. 11-12 (1971) ..	5-6, 15
STATUTES	
29 U.S.C. § 161 (1) 1982)	6
29 U.S.C. § 2000e-9 (1964), <i>as amended by Pub. L. No. 92-261 § 7, Mar. 24, 1972</i>	16
42 U.S.C. § 2000e-5 (b) and (f) (1982)	9
42 U.S.C. § 2000e-8 (a) (1982)	6
42 U.S.C. § 2000e-8 (e) (1982)	28
42 U.S.C. § 2000e-9 (1982)	6
Fed. R. Evid. 501	17
PERIODICALS	
Cooper, <i>Title VII in the Academy: Barriers to Equality for Faculty Women</i> , 16 U.C. Davis L. Rev. 975 (1983)	15

TABLE OF AUTHORITIES—Continued

	Page
DeLano, <i>Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?</i> , 14 J. Col. & Univ. L. 121 (1987)	26
 MISCELLANEOUS	
G. Bednash, <i>The Relationship Between Access and Selectivity in Tenure Review Outcomes</i> University Microfilms Dissertation Abstracts, Pub. No. 8919870 (August 1989)	18-19, 20, 22
8 <i>Wigmore on Evidence</i> § 2285 (McNaughton rev. ed. 1961).....	18

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-493

UNIVERSITY OF PENNSYLVANIA,

v. *Petitioner,*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE
NOW LEGAL DEFENSE AND EDUCATION FUND,
ROSALIE TUNG,
AAUW LEGAL ADVOCACY FUND,
AFRICAN AMERICAN ASSOCIATION,
ASIAN PACIFIC AMERICAN LEGAL CENTER
OF SOUTHERN CALIFORNIA,
ASSOCIATION OF WOMEN FACULTY
AND ADMINISTRATORS OF THE
UNIVERSITY OF PENNSYLVANIA,
FEDERATION OF ORGANIZATIONS
FOR PROFESSIONAL WOMEN,
NATIONAL COALITION FOR UNIVERSITIES
IN THE PUBLIC INTEREST,
NATIONAL WOMEN'S LAW CENTER,
NATIONAL WOMEN'S STUDIES ASSOCIATION,
WOMEN'S EQUITY ACTION LEAGUE,
WOMEN'S LEGAL DEFENSE FUND
IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Rosalie Tung is the former associate professor in the Management Department of the University of Pennsylvania Wharton School of Business whose charge of sex discrimination gave rise to this case. Professor Tung is

currently Wisconsin Distinguished Professor, Business Administration, and Director, International Business Center, at the University of Wisconsin.¹ The remaining *amici curiae* are organizations whose members are directly concerned with the eradication of discrimination against all women and minorities in higher education. The individual statements of interest of the organizational *amici curiae*—NOW Legal Defense and Education Fund, AAUW Legal Advocacy Fund, African American Association, Asian Pacific American Legal Center of Southern California, Association of Women Faculty and Administrators of the University of Pennsylvania, Federation of Organizations for Professional Women, National Coalition for Universities in the Public Interest, National Women's Law Center, National Women's Studies Association, Women's Equity Action League and Women's Legal Defense Fund—are contained in the Appendix to this brief.

Tenure is a critical issue for the advancement of women and minorities who serve as both participants and important role models in the academic environment. The issue presented by this case will have a dramatic impact on the ability of professors to enforce their Title VII rights. Attempts by universities to shield peer review material from EEOC subpoenas and civil discovery threaten to eviscerate the Title VII enforcement scheme and to prevent victims of discriminatory tenure decisions from obtaining the remedies provided under the statute.

The issue here, quite simply, is whether universities should be granted a special right to conceal evidence that is highly relevant to a charge of discrimination. All other types of employers, including labor unions, law firms and accounting firms, are required to produce documents related to employment decisions challenged under Title VII.

¹ The Wisconsin Distinguished Professorship is a highly selective five-year appointment based on competition among candidates from all 14 campuses of the University of Wisconsin and across all disciplines taught in the University system. Only 17 Wisconsin Distinguished Professorships are currently awarded.

Amici submit that the decision below is correct. The Equal Employment Opportunity Commission must have access to all relevant documents if universities' employment decisions are to be reviewable for unlawful discrimination. This review need not and will not impede a university's ability to hire and tenure the best qualified individuals. Because the Court's decision will have a direct effect on matters of prime importance to *amici* and their memberships, *amici* submit this brief to assist the Court in the resolution of this case.²

SUMMARY OF ARGUMENT

Effective enforcement of Title VII requires broad subpoena powers, limited only by relevance to the inquiry. The Court has explicitly rejected arguments similar to the University's request that the EEOC be required to show substantial evidence of discrimination *before* a subpoena to review tenure documents is judicially enforced. *EEOC v. Shell Oil*, 466 U.S. 54 (1984). There is no reason for the Court to abandon the established enforcement scheme to create an exception for peer review material.

The Commission cannot determine whether a university's tenure decision is based on permissible academic grounds or invidiously discriminatory grounds without examining the peer review materials on which that decision is based. Whenever an individual tenure decision is challenged, the peer review materials are clearly relevant to the EEOC's investigation and essential to conducting a thorough investigation. Peer review materials are no less critical to the tenure decision issue here than they were to the decision challenged in *Price Waterhouse v. Hopkins*, 490 U.S. —, 109 S. Ct. 1775 (1989).

The Court has held that complainants "must have an opportunity to prove" the employer's stated reason for an adverse decision is "not its true reason." *Texas Dep't*

² Pursuant to Rule 36 of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

of *Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Access to peer review materials of a tenure candidate and comparable candidates is essential to such a showing. *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). The Court has recognized that liberal discovery rules are necessary to Title VII cases.³

Universities have no constitutional right to engage in invidious discrimination. Like other employment evaluation processes, university peer review for tenure decisions can survive scrutiny by the EEOC. "Sunlight is the best of disinfectants."⁴ Such scrutiny will force reviewers to rely solely on academic grounds rather than invidiously discriminatory grounds.

The need for effective enforcement of Title VII clearly outweighs the speculative benefits of confidentiality in the peer review process. The "qualified privilege" proposed by the University would interfere substantially with the EEOC's investigation of tenure decisions, exclude relevant evidence and permit universities to hide their invidiously discriminatory activity behind the closed doors of tenure review committee meetings.

ARGUMENT

I. THE LANGUAGE, HISTORY AND PURPOSE OF TITLE VII MANDATE BROAD EEOC SUBPOENA POWER

In the proceeding below, the Third Circuit properly refused to curtail the EEOC's subpoena powers during an investigation into allegations of employment discrimination against the University of Pennsylvania. The University now asks the Court to limit substantially the EEOC's investigatory powers by requiring the Commis-

³ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. —, —, 109 S. Ct. 2115, 2125 (1989).

⁴ *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), quoting Justice L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933).

sion to demonstrate, in a proceeding enforcing a subpoena of peer review materials, that it has found significant evidence of discrimination in other nonconfidential materials. The University's demand for special treatment of peer review materials stands the Title VII enforcement scheme on its head and should be decisively rejected. Once before the Court refused to impose such a burden on the EEOC because it would interfere with the EEOC's ability to enforce Title VII as Congress provided. *EEOC v. Shell Oil*, 466 U.S. 54 (1984). As the Court declared in *Shell Oil*, Congress authorized the Commission to "insist that [an] employer disgorge any evidence relevant to the allegations of discrimination contained in the charge, regardless of the strength of the evidentiary foundation for those allegations." 466 U.S. at 72 (emphasis added).

In passing Title VII, "Congress indicated that it considered the policy against discrimination to be one of the 'highest priority.'" *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Congress extended Title VII to educational institutions in 1972 because it believed that "[d]iscrimination against women and minorities in the field of education [was] as pervasive as discrimination in any other area of employment." H.R. Rep. No. 238, 92d Cong., 1st Sess. 19, reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2155.⁵ Indeed, Congress noted that "[m]any of the most famous and best remembered civil rights cases have involved discrimination in education,"⁶ discrimination which it determined was not

⁵ "It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination." S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971); H.R. Rep. No. 238 at 20.

⁶ See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950), *reh'g denied*, 340 U.S. 846

"limited to students alone." S. Rep. No. 415, 92d Cong., 1st Sess. 11-12 (1971).

Congress has empowered the EEOC to investigate and conciliate claims of discrimination brought under Title VII.⁷ The EEOC process is triggered when an individual files a charge of employment discrimination. The EEOC then investigates the allegations raised. In connection with its inquiry, the Commission may inspect and copy "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is *relevant* to the charge under investigation." 42 U.S.C. § 2000e-8(a) (1982) (emphasis added).⁸ Since Title VII was enacted, "courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69.

The purpose of the EEOC's investigation, quite obviously, is to determine whether there is reasonable cause to believe the allegations contained in the charge are true. *Shell Oil*, 466 U.S. at 71. The University wants to force the EEOC to prove that the allegations contained in the charge are true before the EEOC has the opportunity to conduct a meaningful investigation. Such a procedure "is plainly inconsistent with the structure of the enforcement procedure." *Id.* Because such a requirement would clearly conflict with Title VII, the Court has pre-

(1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962).

⁷ In 1972, the same year it added educational institutions to the coverage of Title VII, Congress granted the EEOC subpoena power. The subpoena power provision contains no exception for educational institutions. See 29 U.S.C. § 161(1) (1982).

⁸ In obtaining such evidence, the Commission may issue administrative subpoenas and request judicial enforcement of those subpoenas. 42 U.S.C. § 2000e-9 (1982).

viously declared that "when deciding whether to enforce a subpoena issued by the EEOC," a court may not "determine whether the charge of discrimination is 'well founded' or 'verifiable.'" *Id.* at 72 n.26. Rather, a district court is required only to "satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge." *Id.* A district court may not attempt to "assess the likelihood that the Commission would be able to prove the claims in the charge" before it enforces a subpoena. *Id.*

Although the University casts its request in terms of academic freedom, it is asking the Court to do violence to the statutory scheme of Title VII. It is illogical, in any event, to require the EEOC to prove its case before it has the opportunity to investigate the facts. The Court should reject this attempt to overturn established precedent and to defeat orderly law enforcement procedures.

II. PEER REVIEW MATERIALS ARE ALWAYS RELEVANT WHEN A PARTICULAR TENURE DECISION IS CHALLENGED AS DISCRIMINATORY

The Court's recent decision in *Price Waterhouse v. Hopkins*, 490 U.S. —, 109 S. Ct. 1775 (1989), demonstrates the relevance of peer review and other evaluations to an employee's claim of employment discrimination. When Hopkins sued Price Waterhouse over its decision to deny her partnership, she found the most probative evidence of discrimination in the comments which the firm's partners had submitted about her candidacy.⁹ The trial court found Price Waterhouse discriminated against

⁹ After Hopkins was nominated for partnership by the partners in her local office, all of the other partners in the firm were invited to submit written comments on Hopkins' candidacy. 490 U.S. —, 109 S. Ct. at 1781. Price Waterhouse relied on these comments when it recommended that Hopkins' candidacy be placed on hold. *Id.* These written comments revealed that one partner described Hopkins as "macho," another suggested that she take a course at charm school, and several others indicated that they objected to her use of profanity because she was a woman. *Id.* at 1782.

Hopkins on the basis of her sex by "consciously giving credence and effect to partners' comments that resulted from sex stereotyping." *Id.*, 109 S. Ct. at 1783. If Hopkins had been denied access to these evaluations, she could not have proven that Price Waterhouse's decision was tainted by impermissible discrimination. Denying the EEOC access to the materials it has subpoenaed in this case would deprive the Commission of the opportunity to find out if reviewers in the tenure process engaged in "sex stereotyping" or other unlawful discrimination.

The EEOC seeks access to the same kind of information that Hopkins used. To determine whether there is reasonable cause to believe Professor Tung's allegation of impermissible discrimination, the EEOC should examine what transpired during her tenure review. To this end, the EEOC has subpoenaed the files compiled during the peer review process by Tung's department and the Personnel Committee, as well as the tenure files of five comparably situated male professors. Because the University's tenure decisions are made primarily through the peer review process,¹⁰ this process is the single most likely place to find evidence of discrimination. That these materials may have been kept confidential does not alter the fact that they are the only materials from which the EEOC may determine conclusively whether the University discriminated. These materials will show whether the University's decision was impermissibly influenced by discriminatory motives and whether the University applied the same standards to this decision as it applied when it considered comparable male candidates. For this reason, the Court should decline, as it has before in *EEOC v. Shell Oil*, to place beyond the EEOC's reach direct evidence relevant to proving discrimination. *Cf. Herbert v. Lando*, 441 U.S. 153, 169-70 (1979) (dis-

¹⁰ According to the University, the peer review process is the "essential element" of its system for determining who to tenure. Brief of Petitioner ("Pet. Br.") at 20.

closure of news sources compelled when plaintiff must have access to source in order to prove malice of defendant in a defamation case).

If the Court denies the EEOC access to the materials it has subpoenaed, it may well undermine the Commission's ability not only to determine reasonable cause for and conciliate Tung's charge but also, in the event that conciliation fails, to vindicate Tung's Title VII rights. After completing its investigation, the EEOC may decide that "reasonable cause" exists to believe that the University discriminated against Tung. 42 U.S.C. § 2000e-5(b) and (f) (1982). Upon such finding the EEOC will attempt to conciliate the charge. Congress empowered the Commission to conciliate claims of discrimination. 42 U.S.C. § 2000e-5(b) (1982). If the EEOC is unable to obtain needed evidence at this stage, the conciliation process will be undermined. The EEOC will similarly be unable to prove at trial that the University discriminated against Tung unless it has access to the documents at issue here either through subpoena or pretrial discovery. Undoubtedly, the University would assert in the context of discovery the same claims that it raises here.

At both stages, an important issue under Title VII law is whether an employee can show that the reason the employer gives for its adverse decision is "not the true reason." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). It is precisely this opportunity that the University wants the Court to deny professors who challenge tenure decisions.¹¹ If the EEOC brings

¹¹ It is clear from the University's request for modification of the subpoena filed with the EEOC that the University believes the Commission should be denied access to confidential peer review materials as soon as the University articulates a legitimate, non-discriminatory reason for its decision. *Trustees of the University of Pennsylvania v. EEOC*, United States District Court for the District of Columbia, CA No. 87-1199, Plaintiff's Motion for Summary Judgment, Exhibit O, Letter from Alan D. Berkowitz, Attorney for University of Pennsylvania, to Thomas P. Hadfield, Acting District Director, E.E.O.C., October 10, 1986. (Personnel

suit on Tung's behalf, it must have an opportunity to prove that the University was more likely motivated by a discriminatory reason than the reason it has given and that the University's "proffered explanation is unworthy of credence." *Id.* at 256.¹² One important method of showing that the University's reason for its adverse decision is mere pretext is to establish that the University granted tenure to similarly situated males. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). For instance, in *Chang v. University of Rhode Island*, 606 F. Supp. 1161 (D.R.I. 1985), the court determined that the University of Rhode Island's failure to consider Roworth, a female professor of art history, for early tenure constituted sex-based discrimination. In reaching its decision, the court examined the tenure files of five men who had been granted early tenure. The court found that the school had discriminated against Roworth on the basis of sex because "three—and perhaps four—males no more deserving than Roworth were treated more favorably." *Id.* at 1266. For the EEOC to assess or make a similar proof of disparate treatment in this case, it must be able to examine Professor Tung's tenure file as well as the tenure files of comparably situated men who were granted tenure.

Of course, an employee, or the EEOC suing on her behalf, would also prevail if the evidence reveals that the University's decision was based on an impermissible motive. The Court's recent decision in *Hopkins* affirms

Committee "clearly sets forth the basis for [its] decision to deny tenure, which was not based on her sex or national origin.") The University would require the EEOC to accept the Personnel Committee's explanation at face value despite the fact that the Grievance Panel that reviewed the Personnel Committee's decision voided the decision because of procedural irregularities. Grievance Panel Report at 3, 4. A copy of the Grievance Panel Report, which was furnished by the University to Professor Tung and others, has been lodged with the Clerk of the Court.

¹² If Tung brings suit on her own behalf, she clearly is entitled to make the same showings.

this principle and demonstrates how an employee may make this showing. Although Price Waterhouse convinced the trial court that the firm had a legitimate reason for its decision not to admit Hopkins to the partnership, that court held that the firm "had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." 490 U.S. at —, 109 S. Ct. at 1783. Because Hopkins demonstrated that these impermissible considerations "played a substantial role in the employment decision," Price Waterhouse will bear the burden on remand of convincing the court it was "more likely than not that the decision would have been the same absent consideration of the illegitimate factor." 490 U.S. —, 109 S. Ct. at 1804 (O'Connor, J., concurring). Thus, Price Waterhouse will not necessarily prevail merely because it articulated—or indeed, proved—a legitimate reason for the adverse decision. Rather, Price Waterhouse must show, by a preponderance of the evidence, that it would have made the same decision absent the sex-based factors. *Accord EEOC v. Tufts Institution of Learning*, 421 F. Supp. 152, 164 (D. Mass. 1975) ("Although the decision appears fair on its face and free from the influences of sex bias," plaintiff is entitled to show that "what appears as valid reasons for denying her tenure were in fact colored by the influence of sex bias").

In the context of Title VII cases challenging tenure decisions, key evidence is virtually always contained in the peer review evaluations held by the university. The fact that defendants possess the evidence crucial to a Title VII plaintiff's proof should not pose an insurmountable burden for employees, because "liberal civil discovery rules give plaintiffs broad access to employer's records in an effort to document their claims." *Wards Cove Packing Co. v. Atonio*, 490 U.S. —, 109 S. Ct. 2115, 2125 (1989). It is through the "benefit of these tools" that plaintiffs are expected to meet their burden of proof. *Wards Cove*, 490 U.S. at —, 109 S. Ct. at 2125. If

the Court denies the EEOC and professors access to peer review material, it will deprive them of evidence necessary to meet their burden of proof in Title VII cases. The Court should instead affirm in this context its decision in *Shell Oil* that the scope of the EEOC's subpoena power is limited only by relevance.

III. GRANTING THE EEOC ACCESS TO PEER REVIEW MATERIAL DOES NOT INFRINGE UPON THE UNIVERSITY'S RIGHT TO ACADEMIC FREEDOM

An EEOC investigation into whether a university discriminated against a professor when it denied her tenure does not infringe on the university's constitutional rights. "An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

Although the Court has not fully explored the contours of universities' first amendment rights, the Court has clearly held that universities do not have a constitutional right to engage in invidious discrimination. *E.g.*, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1982), *cert. denied*, 371 U.S. 828 (1962). In *Bakke*, for example, Justice Powell declared that although a decision regarding "who may be admitted to study" is one of the "four essential [academic] freedoms," the first amendment does not allow a university the right to exclude students from consideration for admission because of their race. 438 U.S. at 312 (quoting Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). As Justice Powell expressly stated, "[a]lthough a university must have wide discretion in making the sensitive judg-

ments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." 438 U.S. at 314.¹³

The Court's ruling that a university has no constitutional right to exclude students on the basis of race logically extends to discrimination on the basis of sex in its selection and promotion of faculty. Whatever degree of protection the Constitution extends to a university's decision to decide on *academic grounds* who may teach, the Constitution does not grant universities a right to engage in invidious discrimination in the selection of its faculty. Although discrimination "may be characterized as a form of exercising freedom of association protected by the First Amendment, . . . it has never been accorded affirmative constitutional protections." *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984), citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

On several other occasions the Court has considered arguments that antidiscrimination provisions, like the one contained in Title VII, impermissibly interfere with the first amendment rights of organizations. The Court has repeatedly upheld the challenged antidiscrimination statute. For example, in *Hishon*, the Court rejected a law firm's claim that the application of Title VII to partnership decisions infringed on the firm's constitutional rights of expression or association. 467 U.S. at 78. Similarly, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court ruled that a Minnesota statute which outlawed discrimination in public accommodations did not imper-

¹³ Discussing in *Bakke* the use of race in admissions procedures to achieve diversity, Justice Powell did not reject the argument that to provide diversity, "race or ethnic background may be deemed a 'plus' in a particular applicant's file." 438 U.S. at 317. He rejected "the reservation of a specified number of seats . . . for individuals from the preferred ethnic groups." 438 U.S. at 315. Of course, achieving diversity was hardly a motivation in the University's decision about Dr. Tung's candidacy for tenure; the tenure denial to Dr. Tung defeated diversity.

missibly interfere with the Jaycees' first amendment right to associate. The Court ruled that any impact the anti-discrimination statute had on the Jaycees' associational rights was outweighed by "Minnesota's compelling interest in eradicating discrimination against its female citizens." 468 U.S. at 623. See also *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. —, 108 S. Ct. 2225 (1988) (upholding New York law forbidding discrimination by private clubs against first amendment and equal protection arguments); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) (upholding California's antidiscrimination statute against charge that it violated first amendment by requiring Rotary Clubs to admit women); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (holding city ordinance, which prohibited publishing "help-wanted" advertisements in sex-designated columns, does not violate freedom of press or speech).

The University's claim that Title VII interferes with its first amendment rights has no greater merit than the challenges to antidiscrimination statutes, on first amendment grounds, which the Court has rejected. Congress' purpose in amending Title VII to include educational institutions was to curb some of the abuses that were rampant on university campuses, not to interfere with the free exchange of ideas. In fact, Congress specifically rejected the argument that extension of Title VII to educational institutions would destroy academic freedom.¹⁴

Congress amended Title VII because it determined that discrimination was as prevalent in colleges and universities as it was in any other sector of our society. The Senate Report indicates that:

¹⁴ During a debate on February 1, 1972, Senator Allen unsuccessfully urged the Senate to restore the exemption for educational and religious institutions to Title VII. He argued that extension of Title VII to educational institutions "could destroy academic freedom." 118 Cong. Rec. 1993 (1972). The Senate rejected the amendment by a vote of 55 to 25. *Id.* at 1995.

[a]s in other areas of employment, statistics for educational institutions indicate that minorities and women are precluded from the more prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs. While in elementary and secondary school systems Negroes accounted for approximately 10% of the total number of positions, in the higher-paying and more prestigious positions at institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominately black institutions. Women are similarly subject to discriminatory patterns. Not only are they generally underrepresented in institutions of higher learning, but those few that do obtain positions are generally paid less and advanced more slowly than their male counterparts.

S. Rep. No. 415 at 12. Years after Title VII was amended, discrimination is still prevalent on university campuses. Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. Davis L. Rev. 975, 998-1004 (1983).

Title VII already accommodates the University's right "to determine on academic grounds . . . who may teach." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Although Title VII prohibits employment decisions based on sex, race, religion and national origin, it "does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions." *Hopkins*, 490 U.S. —, 109 S. Ct. at 1784. "[W]hile an employer may not take gender into account in making an employment decision . . ., it is free to decide against a woman for other reasons." 109 S. Ct. at 1787. "Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Id.* (citations omitted). A university is clearly entitled to decide on *academic grounds* that a tenure candidate of any sex, race or national

origin is not qualified to receive tenure. Title VII only prohibits a university from injecting discriminatory considerations into its decision.

The Court should not ignore the long history of discrimination by educational institutions that prompted Congress to act in 1972. Although the University pays lip service to its obligation not to discriminate, it invokes the notion of academic freedom in an effort to create a constitutional barrier behind which discrimination "may go undetected and unpunished." *Herbert v. Lando*, 441 U.S. at 158. The only way to determine whether a tenure decision was made on academic grounds or on discriminatory grounds is to examine the materials used to make the decision. The first amendment academic freedom privilege the University asks the Court to adopt would shield these materials behind a barrier unless the EEOC could prove with other evidence that the University had discriminated. Requiring the EEOC to prove discrimination before it has access to all relevant evidence would protect universities that engage in impermissible discrimination whenever the evidence of their illegal behavior was contained in confidential files. Without access to those files, discrimination could not be redressed.

Congress has decided that universities are subject to Title VII just as other employers are. In 1972, the same year Congress deleted the exemption for institutions of higher education contained in the original Title VII legislation, Congress also amended the statute to make Section 11 of the National Labor Relations Act, authorizing the issuance of subpoenas, applicable to EEOC investigations. 42 U.S.C. 2000e-9 (1964), as amended by Pub. L. No. 92-261 § 7, Mar. 24, 1972. There is no indication in the legislative history of Title VII, as amended, that Congress would permit universities to bar the EEOC's access to material relevant to an investigation. *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 115 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986). Subpoenas

issued by the EEOC to universities, therefore, should be enforceable under precisely the same conditions as are subpoenas issued to any other employer. The University's attempt to invoke academic freedom to shield it from an EEOC subpoena should be viewed for what it is: a blatant attempt to cripple an investigation into the University's employment practices.

The threat to academic freedom lies not in the enforcement of EEOC subpoenas but in the creation of a barrier behind which universities may hide evidence of discrimination. *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982) (refusing to grant a privilege, based on academic freedom, to professor who refused to reveal his tenure vote in deposition during employment discrimination suit).¹⁵ Just as the first amendment does not shield law firms or clubs from prohibitions against discrimination, it does not shield universities from having to disclose evidence needed to determine whether the university has violated Title VII.

IV. BECAUSE CONFIDENTIALITY IS NOT ESSENTIAL TO THE PEER REVIEW PROCESS, THIS COURT SHOULD NOT BURDEN THE EEOC BY RECOGNIZING A QUALIFIED PRIVILEGE

The Court should refuse the University's request for a qualified privilege because the University has failed to provide adequate justification for creation of a new privilege. Rule 501 of the Federal Rules of Evidence permits courts to recognize an evidentiary privilege when the court determines that such a privilege is required by the Constitution or warranted under "the principles of the common law as they may be interpreted . . . in light of reason and experience." Because "privileges contravene

¹⁵ The Court declared that it was construing "an allegation that the [university] decided a tenure application on other than academic grounds, which clearly takes it outside what the *Bakke* Court envisioned to be the limits of academic freedom." 661 F.2d at 431 (emphasis in original).

the fundamental principle that 'the public . . . has a right to every man's evidence,' . . . they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Trammel v. United States*, 445 U.S. 40, 50 (1980), quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) and *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). Neither the Constitution nor common law warrants creating the exception sought in this case.

As shown in Part II^L above, a Title VII investigation does not infringe on a university's constitutional rights. Thus, the Constitution may not serve as the source of a privilege to withhold relevant evidence from discovery in such cases. Before a privilege is recognized under the common law, two requirements clearly must be met. The court must determine that confidentiality is essential to the communication for which a privilege is sought. 8 *Wigmore on Evidence* § 2285 (McNaughton rev. ed. 1961). The court must also determine that the privilege would promote "sufficiently important interests to outweigh the need for probative evidence." *Trammel*, 445 U.S. at 51. No privilege for peer review material should be recognized under the common law because the University has failed to show that confidentiality is essential to the peer review process, and that the University's interest in non-disclosure outweighs the burden such a privilege would impose on the EEOC.

A. Granting the EEOC access to peer review materials will not impair the University's ability to make sound tenure decisions

The University's request for recognition of a qualified privilege based on common law principles rests on the wholly unsupported assertion that confidentiality is essential to the peer review process. The only empirical study that has examined this assumption concludes that con-

fidentiality is not an essential element of the peer review process. G. Bednash, *The Relationship Between Access and Selectivity in Tenure Review Outcomes*, University Microfilms Dissertation Abstracts, Pub. No. 8919870 (August 1989) ("Bednash Study").¹⁶ Indeed, not all universities guarantee confidentiality to evaluators.

While recognizing that confidentiality may increase candor,¹⁷ the Court has refused to recognize a privilege when the party seeking the privilege could not adequately demonstrate that confidentiality was necessary to the relationship the privilege was invoked to foster. *See, e.g., United States v. Nixon*, 418 U.S. 683, 705 (1974). In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court refused to recognize a reporter-informant privilege because the "[e]stimates of the inhibiting effect of . . . subpoenas [issued to reporters] on the willingness of informants to make disclosures to newsmen [were] widely divergent and to a great extent speculative." 408 U.S. at 693-94. The evidence in the present case is similarly divergent and speculative.

The University asserts that peer reviewers will be less candid in their evaluations without confidentiality and, as a result, universities will not have the information required to make selective decisions about who to tenure.

¹⁶ "[T]he most significant finding of [the Bednash Study] is that the degree of selectivity evidenced by an institution does not decrease if candidates are given greater access to the review process." Bednash Study at 137-138. The Study's "restrictive tests of the relationship between access and selectivity not only refute the assumption [that there is a relationship between the degree of access available to tenure candidates and the selectivity of a college concerning tenure] but provide some indication that institutions that provide greater access to the evaluative comments of reviewers are likely to be more selective in granting tenure." *Id.* at 138. *See* Bednash Study at 129-139.

¹⁷ Confidentiality may also increase the opportunity to speak dishonestly about a candidate. *See In re Dinnan*, 661 F.2d 426, 432 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982); *Paul v. Stanford University*, 46 Fair Emp. Prac. Cas. (BNA) 1350 (N.D. Cal. 1986).

Contrary to this claim, however, the Bednash Study shows that those liberal arts institutions that routinely provide tenure candidates with access to peer review materials are just as selective as the institutions that deny similar access. Bednash Study at 322. The decisive selection factor in tenure determinations is the institution's self-defined conception of acceptable rates for granting tenure, as shaped by history and tradition, not the degree of confidentiality afforded to peer review materials. Bednash Study at 336.

The University relies solely on affidavits from individuals with a keen interest in perpetuating confidentiality. Four of these thirteen affidavits are from individuals with direct ties to the University—two exercised some responsibility for the decision to deny Tung tenure,¹⁸ one was an associate dean of the Wharton School during the time Tung taught there,¹⁹ and the other was a member of the faculty for eighteen years.²⁰ Four of the affidavits are from individuals who work at schools that have joined an *amicus* brief supporting the University's position.²¹ Eleven of the affidavits are from individuals in administrative positions at universities,²² including one who has previously published a statement criticizing the procedures followed in tenure reviews.²³

¹⁸ Affidavits of Sheldon Hackney, President, University of Pennsylvania and William P. Pierskalla, Deputy Dean for Academic Affairs, Wharton School.

¹⁹ Affidavit of Ronald E. Frank.

²⁰ Affidavit of James O. Freedman.

²¹ Affidavit of Aaron Lemonick, Princeton University; Paul J. Mishkin, University of California, Berkeley; James N. Rosse, Stanford University; and Robert B. Stevens, University of California, Santa Cruz.

²² Affidavits of John Brademas, John P. Fackler, Jr., Ronald E. Frank, James O. Freedman, Sheldon Hackney, Aaron Lemonick, Harry C. Payne, Clinton A. Phillips, William P. Pierskalla, James N. Rosse, and Robert B. Stevens.

²³ In his affidavit, James O. Freedman, President of Dartmouth College, describes the tenure system in glowing terms. He made

More importantly, the affidavits on which the University relies are mere conjecture about the impact of disclosure on the peer review process. None of the affiants has conducted a study to measure the effects of disclosure. Instead they resort to speculation regarding the effect of disclosure on other persons who are asked to participate. For example, the affiants resort to such phrases as, in my "opinion," and "one can anticipate."²⁴ These statements of personal opinion and speculation are contradicted by affidavits the EEOC submitted in the same proceeding showing that other academicians do not believe confidentiality is essential to the peer review process.²⁵

Viewed in its entirety, the University's evidence for its claim that confidentiality is an essential element of the peer review process does not rise to the level of the evidence the Court considered and rejected in *Branzburg*. In *Branzburg*, the reporters produced independent

earlier statements while serving as ombudsman at the University of Pennsylvania that indicate he had more skepticism about the process as a faculty member than he does now as an administrator. See Freedman, *An Ombudsman's Angle of Vision*, *Almanac* (Sept. 17, 1974) 4, 5 ("On more occasions than I would have expected, faculty colleagues of the individual who was denied tenure have supported his claim of procedural unfairness, if not arbitrariness. They have testified, variously, to the selective solicitation of outside evaluations, the introduction of antipathies of a purely personal nature, the failure of voting members of the faculty to familiarize themselves with the individual's file, and attempts by deans and department chairs to use their authority in a coercive manner.")

²⁴ Affidavit of Ronald E. Frank at 3; Affidavit of Aaron Lemonick at 4; Affidavit of Harry C. Payne at 3.

²⁵ See, e.g., Affidavit of Barbara R. Bergmann, Distinguished Professor of Economics at American University; Affidavit of Julius Getman, former President of the American Association of University Professors; Affidavit of Ann C. Scales, Visiting Professor of Law at Boston College Law School; Affidavit of Theda Skocpol, Professor of Sociology at Harvard University. Copies of these and other affidavits stating that confidentiality is not essential to the peer review process have been lodged with the Clerk of the Court.

studies to support their claim that "the flow of news [would] be diminished by compelling reporters to aid the grand jury in a criminal investigation." 408 U.S. at 693-94. Here, the empirical evidence indicates confidentiality is not necessary to the tenure process. Bednash Study at 129-139. The University has not produced any empirical support for its opinion. Because the University has not adequately demonstrated that confidentiality is an essential element of the peer review process, the University fails to meet the prerequisites for establishment of a privilege. There is no indication that confidentiality is essential to the preservation of the academic relationships involved in the faculty review process.

B. The EEOC's need for the documents it has subpoenaed far outweighs the University's interest in keeping the documents confidential

1. *The privilege the University seeks will substantially interfere with the EEOC's ability to investigate and eradicate discrimination*

The EEOC has subpoenaed two sets of files: those compiled when the University considered Tung's candidacy and those compiled when it decided to grant tenure to five comparably situated male professors. These files are highly relevant to the investigation of Professor Tung's charge. Tung's charge contains two principal allegations. First, Professor Tung alleges that the Chair of the Management Department, in which Professor Tung taught, sexually harassed her and prevented her from getting tenure after she rejected his advances.²⁶ The

²⁶ More specifically, the charge alleges that "Peter Lorange [Tung's Department Chair] submitted a four-page letter to the Personnel Committee concerning" Professor Tung that Tung believes was negative. Joint Appendix at 28-29. It also alleges that "[b]eginning in 1982, Peter Lorange asked [Tung] on several occasions to accompany him on business trips and attempted to get into conversations with [Tung] of a personal nature about such matters as his relationship with his wife. [Tung believes] that [her] reaction to this, which was to make sure that [their] rela-

second allegation contained in Tung's charge is that her "credentials, performance, publication record, scholarship and teaching skills are equal to or better than five men who were granted tenure." These allegations confirm the relevance of the materials sought under the subpoena. This is true whether or not the materials sought in fact confirm that discrimination has occurred. In this case, however, the materials, to the extent that their contents are known, dramatically demonstrate that the University discriminated against Professor Tung. Consequently, withholding materials will substantially interfere with the EEOC's ability to investigate and eradicate discrimination.

The Personnel Committee, the body which decided not to award Professor Tung tenure, indicated one of the reasons it did not recommend her for tenure was that the Management Department's recommendations were decidedly weak.²⁷ In reviewing the University's decision to deny Tung tenure, the Grievance Panel, in a report that the University seeks to withhold under claim of privilege,²⁸ found that her Department Chair's extremely negative reaction to her candidacy "seems to reflect unexplainable or subjective elements" and that the "sudden, dramatic nature of this change on the part of the Department Chairperson necessarily placed junior faculty under

relationship stayed strictly professional, upset him and is a factor of his present behavior (lack of support) toward [her]." *Id.*

²⁷ Letter for Dr. Morris Hamburg, Chairman of the Personnel Committee to Dean Russell Palmer (Sept. 26, 1985).

²⁸ When the EEOC introduced the Grievance Panel's report during the deposition of William Pierskala, Deputy Provost of Wharton, the University's counsel asserted that the report was confidential and should not have been in the EEOC's possession. As shown by the documents lodged by amici with the Clerk of the Court, however, the University sent a copy of the Grievance Panel's Report to Professor Tung and others. See note 11 *supra*. Apparently this is just the kind of highly relevant information the University seeks to prevent the EEOC from obtaining.

serious pressure, thereby contributing to a split departmental vote." Grievance Panel Report at 1. The Panel also found that the Department Chair's behavior "produce[d] a flawed and biased tenure review of the candidate's qualifications not consistent with the orderly and objective standards normally required of such a review." *Id.* at 3. Further, one member of the Panel who reported on the sexual harassment charge described the challenged decision as "a classic instance of the Chairman's evaluating the candidate on the basis not of her merits but her lack of response to his personal approach." Addendum to the Panel Report. These findings lead to only one conclusion: barring the EEOC's access to reviewing Tung's tenure file will withhold probative evidence of the impermissible influence that the Department Chair had on the University's decision and thus will substantially impede the EEOC's investigation.

The Personnel Committee also indicated that one reason for its adverse decision concerning Professor Tung's tenure was that it had serious concerns about the quality of her publications. After the Grievance Panel reviewed the files of eleven other professors who were granted tenure, it concluded that sex-based bias could not be ruled out as an explanation for the unfavorable decision. Grievance Panel Report at 3. In light of this finding, the EEOC obviously needs to examine the tenure files of the five men listed in the charge to determine whether the Personnel Committee applied the same criteria to the men as it did to Tung.

The University says the courts should require the EEOC to make a particularized showing it has some reason for access before enforcing a subpoena for confidential peer review materials. Pet. Br. at 47. Such a test could be met, according to the University, when (1) a university fails to provide a statement of reasons for the denial of tenure or (2) the EEOC shows either that the subpoenaed peer review documents "will substantially promote the [Commission's] factfinding proc-

ess" or there is substantial evidence of discrimination in the nonconfidential information made available to the EEOC. Pet. Br. 46-47.

The University's test is nothing more than an unnecessary and potentially confusing reformulation of the relevance standard articulated in *Shell Oil*. It would only generate confusion in the lower courts and create greater expense for parties, who would be forced to define the contours of the new language through litigation. As long as the documents are relevant, they will always "substantially promote the Commission's factfinding process." Thus, the proper test should be the test set forth in *Shell Oil*: namely, whether the requested materials are relevant. Courts are familiar with the relevance standard now applied and are capable of applying it with relative ease.

In addition, the University's standard requiring the EEOC to find substantial evidence of discrimination in nonconfidential information before granting the Commission access to peer review material would clearly be unreasonable. The most probative evidence of whether discrimination tainted the decision to deny Professor Tung tenure is most likely contained in the peer review materials. Yet the University insists that the EEOC should not have access to these materials unless and until it finds evidence of discrimination in materials not directly revealing what happened during the peer review process. The University would require the EEOC to find evidence of discrimination in the Personnel Committee's statement of reasons for the denial of tenure, the University's description of its treatment of Professor Tung's candidacy, charts showing tenure decisions and appointments to full professor by sex, race and national origin, sections from the University's handbook governing the tenure review and grievance processes, and descriptions of the University's policies on faculty salary merit increases. These materials simply do not contain the information needed to determine whether the University discriminated against Tung.

The statements and descriptions prepared by the University and its Personnel Committee are of little value because they are inherently self-serving. A university that claims it has not discriminated is hardly likely to prepare a summary indicating discrimination. *Cf. Herbert v. Lando*, 441 U.S. at 170 (recognizing that media defendants tend to assert that their behavior was beyond reproach). The problem is amply illustrated in a case involving Stanford University, one of the *amici* supporting the University and urging the Court to recognize a privilege. The federal district court for the Northern District of California found it could not rely on Stanford to summarize fairly the contents of peer review materials. Summaries that Stanford prepared excluded some information and comments favorable to the plaintiff and did not fully expose the thought processes of the evaluators. The court expressed doubts that it, or the plaintiff, "could feel assured that summaries prepared by Stanford, a vitally interested party, would fully reflect the contents of the evaluations." *Paul v. Stanford Univ.*, Fair Empl. Prac. Cas. (BNA) 1350, 1356 (N.D. Cal. 1986).²⁹ Requiring the EEOC to derive evidence of discrimination in such self-serving summaries before gaining access to allegedly confidential files would mean a university could effectively deny access to the evidence contained in the materials.

The other materials the University suggests will contain adequate evidence of discrimination may be equally useless in the context of a claim of unlawful discrimina-

²⁹ Stanford's behavior illustrates why the Court should reject the approach adopted by the Second Circuit in *Gray v. Board of Educ., City of New York*, 692 F.2d 901 (2d Cir. 1982), that would permit a university to avoid disclosure by providing the candidate with a meaningful statement of reasons. See DeLano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?*, 14 J. Col. & Univ. L. 121, 142-44 (1987) (discussing risks of permitting universities to avoid discovery by providing statement of their reasons and difficulty inherent in asking court to review explanation for adequacy).

tion against an individual. Charts that depict the University's track record on the hiring, promotion and salaries of women and minorities do not shed any light on Professor Tung's allegation that her Department Chair interfered with her tenure review because she rejected his advances. A good overall track record does not mean the University did not discriminate against Tung. *See Connecticut v. Teal*, 457 U.S. 440 (1982). This information will not enable the EEOC or court to determine whether the decision against granting Professor Tung tenure was tainted by discrimination or whether Tung was judged by different standards than those applied to comparable men. The only way to make these determinations is to examine the tenure review files of Tung and the comparable men.

2. *A qualified academic freedom privilege will not in fact advance the University's interest*

The qualified academic freedom privilege sought by the University will not, as the University asserts, Pet. Br. at 10, 11, 34-35, promote candor in the peer review process. The very nature of a qualified privilege means that peer reviewers will have no assurance their comments will remain confidential. Assuming for the sake of argument that confidentiality has some positive effect on candor, the effect is only as strong as the evaluator's belief that evaluative comments will remain confidential. Recognition of a qualified privilege for peer review materials would mean that only some evaluations would be shielded from disclosure. In those instances in which a court determined disclosure was justified, access would be granted. Evaluators participating in the peer review process would have no way of knowing at the time they participate whether their comments would remain confidential.³⁰ As the Court explained in *Branzburg*, "[i]f newsmen's confidential sources are as sensitive as they

³⁰ Even if the Court develops a legal standard that provides evaluators with guidance regarding when peer review materials will be disclosed, evaluators will not be able to determine when

are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem." 408 U.S. at 702.³¹

The University, in asking the Court to recognize a privilege for academic freedom, ignores the Court's view that "privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. at 49. "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

The University's position fails to recognize that the potential for disclosure of tenure reviews may promote fair decisions. The Fifth Circuit, when it refused to recognize an academic freedom privilege said, "We fail to see how, if a tenure committee is acting in good faith, our

their comments will be kept confidential. Whether their comments will be disclosed will depend as much on the facts of a specific case, which are beyond the control of an individual evaluator, as on the legal standards which the Court adopts. The Court recognized this difficulty in *Branzburg* and listed it as one of the reasons for not granting a privilege:

Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of "importance" or "relevance" in relation to the free press interest. . . . Leaving substantial discretion with judges to delineate those "situations" in which rules of "relevance" or "importance" apply would therefore seem to undermine significantly the effectiveness of a reporter-informant privilege.

408 U.S. at n.39.

³¹ Even if the Court felt there were some reason to prevent public release of the material, that would be insufficient basis for withholding the evidence from the parties in a lawsuit. Courts have authority to impose a protective order on documents and testimony as is necessary. Additionally, the statute governing the EEOC's subpoena power, 42 U.S.C. § 2000e-8(e) (1982), provides for criminal penalties for those who publicize information discovered during an EEOC investigation.

decision today will adversely affect its decision-making process. Indeed, this decision should work to enforce responsible decision-making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind 'academic freedom' to avoid responsibility for their actions." *In re Dinnan*, 661 F.2d 426, 432 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982).

CONCLUSION

The Third Circuit correctly determined that *bona fide* academic freedom is not implicated if the EEOC is allowed access to relevant tenure review files. The University has not demonstrated that the Court should create a new evidentiary privilege, for it has not shown that confidentiality is necessary to the tenure process. The University has further failed to demonstrate that the University's interest, if any, in protecting tenure decision-making communications from scrutiny outweighs the societal interests in eradicating unlawful discrimination and in securing all relevant evidence in an investigation of discrimination.

For the foregoing reasons, the decision of the Third Circuit should be affirmed.

Respectfully submitted,

Of Counsel

SARAH E. BURNS
NOW Legal Defense
and Education Fund
39 Hudson Street
New York, New York 10013

SUSAN DELLER ROSS
MARY DELANO
Sex Discrimination Clinic
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9640

R. BRUCE KEINER, JR.*
LORRAINE B. HALLOWAY
VICTORIA L. EASTUS
SUSAN A. BOOTH
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

* Counsel of Record for the
Amici Curiae

August 10, 1989

APPENDIX

APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization of Women, a membership organization of approximately 200,000 men and women in 764 chapters throughout the United States. A major goal of the NOW LDEF is securing equal rights for females and males in education and in employment. In pursuit of this goal, NOW LDEF pursues litigation challenging sex bias in education and employment under both Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964. In addition, NOW LDEF's Project on Equal Education Rights ("PEER") works for equal rights in education through activities that include monitoring enforcement of federal and state Title IX statutes. In the experience of the Fund, access to relevant information is critical to eliminating discrimination.

The American Association of University Women ("AAUW") Legal Advocacy Fund provides funding and a support system for women seeking judicial redress for sexual discrimination. The Legal Advocacy Fund has been fighting sex discrimination in institutions of higher education for nine years. AAUW, a national organization of over 140,000 college educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. AAUW supports basic constitutional rights for all persons, and opposes all forms of discrimination. Therefore the AAUW Legal Advocacy Fund has a strong interest in the outcome of this case.

The African American Association was organized more than fifteen years ago. The organization's membership

is drawn from administrators, faculty and staff throughout the University of Pennsylvania. It exists to enhance the quality of life for African Americans at the University, to insure African American presence and permanence at the University, and to coalesce with other groups at the University whose purpose is the elimination of oppression of disadvantaged and under-represented groups.

The Asian Pacific American Legal Center of Southern California ("APALC"), founded in 1983, is a multifaceted, non-profit organization providing language-specific legal assistance, information, and civil rights support for low-income people, especially those of Asian and Pacific Island origin. APALC supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, APALC has a strong interest in the outcome of this case.

The Association of Women Faculty and Administrators of the University of Pennsylvania is a membership organization which has been in existence for over 40 years and is open to all academic and administrative women employees of the University. As such, it has maintained an interest in safeguarding and enhancing the ability of women faculty and administrators to realize their full professional potential, free of the discriminatory practices and attitudes that have for so long been a part of the University tenure and promotion processes. Members of the Association know from concrete experience—including the denial of tenure to Professor Rosalie Tung, which gave rise to the present proceeding—that the task of eradicating the effects of gender-based discrimination is far more difficult, and the need to retain unimpaired the ability of the Equal Employment Opportunity Commission to carry out its mission far more critical, than is suggested by Petitioner here.

The Federation of Organizations for Professional Women ("FOPW"), a federation composed of thirty affiliated organizations representing women scientists, economists, edu-

cators, administrators, counselors and others, is dedicated to working toward the goals we have in common: equity and progress. Since 1972, the FOPW has provided a fulcrum where women's organizations can work together to impact policy that affects professional women and identified mutual goals and concerns and addresses them through collective action. The FOPW strongly supports the right of the Equal Employment Opportunity Commission to review all documents held by a university that will help determine whether a decision to deny tenure was equitable and a sound academic decision. The FOPW is aware of the importance of the outcome of this decision for women and minorities and is most interested in this case.

The National Coalition for Universities in the Public Interest is a non-profit (501(c)(3)) organization whose main task, since its founding in 1983, has been to preserve academic freedom and to protect faculty members from racial and sexual discrimination by colleges and universities. The Coalition has roughly three thousand faculty supporters and members, and has offered legal support to more than eighty faculty members who are suffering discrimination. To date, the Coalition has been actively involved with more than twenty law suits against universities, most of which involve racial and sexual discrimination.

The Coalition's judgment, based on wide and recent experience, is that universities discriminate as frequently as other employers. Access to peer review documents is essential to proving that illegal discrimination has taken place. Academic freedom traditionally protects individual faculty members against abuses by academic employers. To permit universities to use academic freedom as a shield to conceal discrimination would turn the traditional protection of academic freedom on its head.

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimi-

nation of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in employment for women through, *inter alia*, the full enforcement of Title VII. It has a deep and abiding interest in assuring that victims of employment discrimination, and the government agencies charged with vindicating their rights, have access to all relevant information.

The National Women's Studies Association ("NWSA") is the professional association for feminist educators, most of whom are located at colleges and universities. Founded in 1977, the Association now numbers 4,000 members and serves as the national spokesperson for the 570 academic Women's Studies Programs. NWSA's primary mission is to promote Women's Studies, enhance the information, research, and curriculum about women's lives, and eradicate sex discrimination as well as other forms of discrimination that present barriers to an individual's growth and fair and equal treatment in society. Because of its base in universities, NWSA established an Academic Discrimination Task Force in 1980, which has assisted more than 60 women who have filed sex discrimination suits against universities. The Task Force's original funding came from two women who themselves had received out of court settlements in sex discrimination suits. While confidentiality might have at one time been beneficial to the academic community, it has become clear that it can also cloak discrimination. NWSA and its Academic Discrimination Task Force believe strongly that it is imperative that women filing sex discrimination suits have access to documents that could prove whether decisions were made fairly or not. Especially in light of recent Supreme Court decisions that place more of the burden of proof on the plaintiff, it is all the more necessary to give a citizen full access to information that could illuminate the proceedings if we hope to guarantee genuine equal treatment in the workplace.

Women's Equity Action League (WEAL) was founded in 1968 as a national, non-profit membership organization sponsoring research, education, litigation and advocacy in order to advance the economic status of women. WEAL supports and recognizes a woman's constitutional right to equal opportunity in education.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.